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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1558

NATIONAL HOCKEY LEAGUE, *et al., Petitioners,*

v.

METROPOLITAN HOCKEY CLUB, INC.,
and GOLDEN BLADES HOCKEY, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The National Hockey League and those of its member clubs listed in the footnote[1] petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is unreported. The opinion of the district court (App.

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[1] Atlanta Hockey, Inc., Boston Professional Hockey Association, Inc., Niagara Frontier Hockey Corp., Chicago Blackhawk Hockey Team, Inc., Detroit Hockey Club, Inc., California Sports Inc., Northstar Financial Corp., Le Club de Hockey Canadien, Inc., Nassau Sports Limited, Madison Square Garden Center, Inc., Seals Management Partners, Philadelphia Hockey Club, Inc., Pittsburgh Penguins, Inc., Maple Leaf Gardens, Limited, Northwest Sports Enterprises Ltd., and Missouri Arena Corp.

E) is reported at 63 F.R.D. 641. Other opinions by the district court in this case (Apps. F and G) are reported at 351 F. Supp. 462 and 371 F. Supp. 742.

JURISDICTION

The judgment of the court of appeals (App. B) was entered February 23, 1976. A petition for rehearing was denied on March 18, 1976. App. C. By order of April 1, 1976 (App. D), the court of appeals stayed its mandate until April 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether under Fed. R. Civ. P. 37(b)(2)(C) and *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), a district court has discretion to dismiss a complaint for violations of discovery orders where the violations, though resulting from gross negligence, were not provably intentional.

2. Whether the scope of review of a district court's Rule 37 dismissal of a complaint is broad enough to permit an appellate court to make, and rely upon, its own findings of fact instead of reviewing the district court's findings under the "clearly erroneous" standard.

3. Whether under Fed. R. Civ. P. 37(b)(2)(C) and *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), a district court may, in determining whether or not to dismiss a complaint for violations of discovery orders, consider the entire previous history of plaintiff's discovery misconduct in addition to the final violation that occasioned the motion to dismiss.

4. Whether, for purposes of the discovery sanctions under Fed. R. Civ. P. 37(b)(2)(C), a party may be charged with the discovery misconduct of its counsel.

STATUTORY PROVISIONS INVOLVED

No statutes are involved. Rule 37 of the Federal Rules of Civil Procedure is set out in Appendix H.

STATEMENT

Introductory

The case below was a complex of antitrust litigation by the World Hockey Association ("WHA") and its member clubs against the National Hockey League ("NHL") and its member clubs. On February 2, 1973, the defendants began seeking discovery. Seventeen months later, as detailed in Judge Higginbotham's findings (App. E, pp. 23a-47a), the plaintiffs had, in substantial part, still not complied with their obligation to supply it and the court dismissed the complaint.

The dismissal motion granted by Judge Higginbotham was the defendants' second such motion. The first had been denied in the exercise of his discretion to impose a lesser sanction, even though, as he concluded, the motion was well-founded and could have supported a dismissal. In ordering the dismissal on defendants' second motion, Judge Higginbotham stated:

> "If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied." App. E, p. 51a.

On February 23, 1976, the Court of Appeals for the Third Circuit reversed that dismissal for abuse of discretion and on March 18, 1976, denied rehearing.

Background Facts

One of the original plaintiffs was WHA's New York franchise holder, Metropolitan Hockey Club, Inc., a corporation organized and owned by two New Jersey trial lawyers. By November 16, 1972, Metropolitan, after meeting its first two payrolls, was in financial trouble and the WHA took over its operations for the rest of the first season. (R. 2898).[2] The next spring, in preparation for the 1973 season, Metropolitan's franchise and player contracts were transferred to Golden Blades Hockey, Inc., a corporation newly organized by Golenbock & Barell, a New York law firm. The two lawyers who had organized Metropolitan received through their corporation about 20 percent of the shares of Golden Blades. A block of Golden Blades stock went to Golenbock & Barell. The balance was held partly by Golenbock & Barell clients and partly by other investors. One of the partners in Golenbock & Barell became an officer and a member of the board and executive committee of the company. By the beginning of the 1973 season, Golden Blades collapsed. Again the franchise was taken over by WHA and this time it expired. (R. 1256, 1317-o, 1348-67, 1788, 1813, 2013, 2156, 2236, 2505-13, 2715-16).

Among the assets Golden Blades took over in the spring of 1973 was Metropolitan's interest in the

[2] "R." references are to the pages of the Joint Appendix printed for use in the Court of Appeals.

antitrust litigation. In addition, Golden Blades became a plaintiff in its own name in one of the later suits consolidated in the litigaton. (R. 1256, 1788, 2898). As parties to the litigation the two corporations are hereinafter referred to collectively as "M-GB."

In the latter half of 1973, counsel for both sides, conscious of the March 18, 1974 trial date fixed by the court, worked strenuously to effect a settlement of the litigation and by January of 1974 had agreed upon a disposition. M-GB announced, however, that it would not participate in the settlement. Accordingly, on February 19, 1974, a consent decree was entered terminating the litigation as to all plaintiffs other than M-GB. (R. 1263). Golenbock & Barell, involved in the litigation since the spring of 1973 as general counsel for M-GB, now took over the case as trial counsel, replacing Mr. Harold E. Kohn of Philadelphia. (R. 1317-o, 2899-2900).

A year before, on February 2, 1973, the defendants had commenced their trial preparation by propounding a set of interrogatories. By reason of M-GB's violations of the discovery rules, as hereinafter described, it had still not answered those interrogatories when all the other parties terminated the litigation. At a pretrial session on February 20, 1974, the day after entry of the consent decree, the court informed counsel for both sides that the March 18 trial date was still firm. NHL counsel, at that session, demanded of Golenbock & Barell the earliest possible answers to the then year-old interrogatories. (R. 1550-56). As will hereinafter appear, the next three months were occupied with M-GB violations of court orders, postponements of deadlines, a motion to compel answers

and two Rule 37 motions to dismiss the complaint, the second of which was ultimately granted on July 3, 1974, after three clear admonitions by the court that repetition of M-GB's noncompliance with orders would produce a dismissal.

Basis for Dismissal of the Complaint

1. The interrogatories, consisting of 120 separately numbered questions, were served on M-GB and the other WHA parties on February 2, 1973. Rule 33(a), Fed. R. Civ. P., required answers by March 5, but the plaintiffs ignored that requirement. (R. 530, 539).

2. Instead, on March 15, 1973, plaintiffs filed an amended complaint. The defendants retailored their interrogatories to dovetail to the paragraph numbers of the new complaint and resubmitted them on March 30, 1973. The new due date for answers was April 30, 1973. That due date as well was ignored. (R. 456, 576, 593, 705-06).

3. Instead, on May 4, 1973, plaintiffs made an untimely motion to extend their time to answer until May 25. Over defendants' objections, the court ordered that objections be filed by May 14 and answers by May 25. (R. 737, 780-81). M-GB violated both parts of this order:

(a) Plaintiffs did not file their objections until May 15 and then they consisted of a clearly insufficient shotgun attack on all the interrogatories as sweeping "too broadly" and being "unduly burdensome, expensive and inefficient." (R. 783).

(b) M-GB's answers to the interrogatories consisted of *a single unsworn and unsigned sentence.* (R. 875). The district court held:

> "By the most liberal construction imaginable of the discovery provisions of the Federal Rules of Civil Procedure Metropolitan's 'answer' after four months fell drastically short of any minimal good faith compliance."[3] App. E, p. 29a.

M-GB's argument, as to its patently contumacious answer, is to lay the responsibility for it upon its then trial counsel, Mr. Kohn. The record shows, however, that Mr. Kohn filed the insufficient answer because M-GB, notwithstanding his pleas, failed to supply him the information needed for proper answers, and, indeed, he warned M-GB: "You better get something filed. Let's hope this will hold the line for you. Otherwise you are going to be out on your you know what."[4] (R. 1734, 1526).

4. On June 7, 1973, the court urged the parties to attempt to agree upon a disposition of all pending discovery problems and then report back to the court.

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[3] The Third Circuit, while grudgingly conceding that M-GB's answer "should have been more specific as required by Fed. R. Civ. P. 33(c)", found it to be error for the district court to consider any of M-GB's misconduct prior to February 19, 1974. App. A, p. 12a.

[4] Notwithstanding that the record thus shows M-GB's clear responsibility, the Third Circuit, as one of its reasons for excluding from consideration all events before February 19, 1974, stated: "The final responsibility for answering interrogatories was with lead counsel and in fact the Kohn firm did prepare many answers itself. Any delays or deficiencies in the answers caused by Kohn should not be attributed to M-GB's present counsel." App. A, p. 14a. The Third Circuit seems to miss the point. Whether or not Kohn's misconduct is attributable to M-GB's present counsel, it is attributable to M-GB itself, as this Court made plain in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-34 (1962). Moreover, since Golenbock & Barell own stock in their client and have a partner on its board and as its secretary, it would seem pointless to try to distinguish between attorney and client.

On June 25, plaintiffs' counsel reported to the court that considerable progress had been made: "the WHA would provide relatively full discovery with respect to the NHL interrogatories and document requests the NHL considers critical." (R. 1200-o). Having thus resolved the most significant of the pretrial problems, the parties then turned their attention to the then ongoing attempts to settle the litigation, always bearing in mind, however, that the trial date had been fixed for March 18, 1974. (R. 458, 1274).

5. Immediately after entry of the consent decree on February 19, 1974, settling the litigation as to all plaintiffs other than M-GB, the defendants, looking toward the imminent trial date, made a demand for answers to their interrogatories. (R. 1555-56). Golenbock & Barell, now appearing as trial counsel for M-GB, advised the court: "We have the information, we will answer them." (R. 1743). Accordingly, in a pretrial order on February 26, 1974, the court fixed March 11, a date agreed to by Golenbock & Barell, as the due date for M-GB's answers.[5] (R. 1925). On March 11, however, M-GB filed neither answers nor a motion for an extension of time. Instead, it wrote a letter to the court, a copy of which was not delivered to defendants' counsel until March 12, requesting an extension of the March 11 due date. (R. 2155).

6. M-GB's violation of the February 26 pretrial order occasioned the defendants' first Rule 37 motion to dismiss the complaint. The court denied the motion, gave M-GB the extension of time and again ex-

[5] By the same order, the court, at M-GB's request, extended the trial date to the week of April 1 or April 8. (R. 1924, 1930).

tended the trial date. (R. 2225-28). In denying the motion, the court said:

> "While I think it would be permissible to grant defendant's motion to dismiss as a matter of discretion, I do not grant it at this time, but I can not imagine on a similar circumstance if such a motion is made for any subsequent breach of the pretrial schedule that plaintiffs would be able to successfully defend against a motion to dismiss." (R. 2224-25).

7. On March 18, 1974, M-GB filed its answers to the interrogatories. At a pretrial session the next day, when defendants attacked the sufficiency of the answers, the court set a time schedule for a motion to compel supplemental answers. (R. 2357-58). This schedule was adhered to, but not without another *ex parte* approach to the court by M-GB for an extension of time, this time by telephone rather than by letter. At oral argument, the court again warned M-GB about its repeated failure to meet deadlines established by the court, stating: ". . . I just hope that it will not happen again because you are at the precipice." (R. 2418).

M-GB's answers to the crucial questions relating to its financial structure were essentially that it lacked the information.[6] (R. 2382-83). Depositions of Metropolitan's officers had revealed substantially no finan-

[6] M-GB claimed it needed access to some of its documents in the hands of others. Judge Higginbotham's offer to order immediate return of any necessary M-GB papers being retained by Mr. Kohn was not taken up. (R. 2401). As to M-GB's claim that some of its papers were in the hands of the WHA or various lawyers or accountants who were owed money, M-GB admitted it had made no efforts to obtain the papers. (R. 2425).

cial information.[7] M-GB counsel built a wall against any probing by instructing the witnesses not to answer, on the asserted ground that such information was only attainable through interrogatories. (R. 2143-46, 2157-58). Yet, the answers to the interrogatories, as we have shown, far from supplying the information, simply built a moat around the wall of silence.

8. On April 12, 1974,[8] the court issued its order requiring M-GB to file supplemental answers. It fixed three due dates: for most of the answers, April 29; for some, as to which M-GB claimed it could not answer without further discovery, not later than July 25; for those relating to damages, not later than June 14. (R. 2483-85). As to the answers due June 14, the court declared in its order:

> "In this regard the plaintiffs are forewarned that the Court will be amenable to entertaining any motions under Fed. R. Civ. P. 37 should such information not be forthcoming by June 14, 1974."[9] (R. 2489-90).

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[7] The only information Metropolitan's officers supplied about its finances was that the original paid-in capital was $25,000. They professed not even to know whether the company was on a cash or accrual basis or on a calendar or fiscal year. (R. 2414-15).

[8] By that time the court, in response to M-GB's urgings, had already re-set the trial date for September 16, 1974. (R. 2352-55).

[9] In a colloquy with the court on March 25, 1974, M-GB counsel had suggested June 15, 1974 as an outside date beyond which, if M-GB for any reason failed to produce the damage information, the court would be justified in ordering a preclusion of M-GB's proof of damages. (R. 2426). Since June 15 fell on a Saturday, the court fixed the date as June 14.

9. The April 29 due date was extended, over defendants' objections, to May 6, 1974,[10] and on that date M-GB filed its first group of supplemental answers, including five of the fifty or so due not later than June 14. As for the rest of those fifty interrogatories, June 14 came and went without a word from M-GB. Nor, when it had been brought to M-GB's notice that the defendants would again move for a Rule 37 dismissal (R. 2933), did M-GB belatedly file the required answers. Instead, they waited until June 19 and then, the same day that the defendants moved to dismiss the complaint, M-GB moved for an extension of time until July 25, 1974, which, as the district court pointed out, would be ten days *after* the termination of all discovery and would thus deprive the defendants of any opportunity to question M-GB about the information produced. (R. 2727, 2732, 2442). The court denied the motion for extension and, on July 3, 1974, granted the motion to dismiss.

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[10] For its supplemental answers due April 29, M-GB claimed that it needed documents from the file of the district court. When M-GB had needed court documents for its case in chief, it had obtained them in time. See Appendix to brief for Defendants-Appellees below. If M-GB really needed to reproduce court documents in order to answer these interrogatories, it had known of that need since February 26, 1974, when it undertook to answer them and when it learned it would not have access to Mr. Kohn's files without a $50,000 payment on its fee obligation. App. G, p. 180a. Yet, it waited until April 17, 1974 before ordering the clerk to reproduce the hundreds of documents it said it needed to satisfy its discovery obligations; and so, on April 24, by still another letter to the court, M-GB sought an extension of the April 29 due date because the clerk could not reproduce all the copies in time. (R. 2503, 2530-31). The court, once more yielding to the necessity produced by M-GB's cavalier attitude toward its obligations, extended the April 29 date to May 6, 1974. (R. 2532).

10. In granting the motion to dismiss on the above-recited facts, Judge Higginbotham stated:

> "Courts today do not condone the 'surprise' approach to discovery whereby at the latest possible moment the parties reveal the substance of their cases. If the discovery process is abused or allowed to be frustrated by the parties, then the entire pretrial procedures and the discovery provisions of the Federal Rules of Civil Procedure can be turned into a mockery. Time deadlines are imposed for valid reasons and there are prescribed procedures by which the time periods can be enlarged *if done in a timely fashion.* An underlying factor here is that a Court must be able to regulate and control in an orderly fashion the progress of discovery. Plaintiffs' counsel in the instant case are not inexperienced and just out of law school. Instead they are seasoned attorneys who know and comprehend the intricacies of federal practice and the importance of discovery in protracted litigation. Sanctions become meaningless unless they are applied when the circumstances demand them, though harsh they may be. After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, *viz.*, June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions. Moreover, this action

> was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed.R.Civ.P. 37. If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied." App. E, pp. 50a-51a.

The Reversal of the Dismissal Order

In order to conclude, as it did, that the district court had abused its discretion in dismissing the complaint, the Third Circuit had to take two steps:

> (1) As to all of M-GB's pre-February 19, 1974 discovery violations (as detailed in numbered paragraphs 1 through 3, *supra*), the court held it error to consider them. App. A, p. 12a.
>
> (2) As to the June 14 violation, which the court called "the crucial facts", it held that there was no discretion to dismiss except for an "intentional" violation and then proceeded to find, in contradiction to the record, that the violation had not been intentional.[11] App. A, pp. 12a, 16a.

In limiting the scope of permissible consideration to M-GB's post-February 19, 1974 violations, the Third Circuit recognized that normally "the full record should be considered. *Diapulse Corp.* v. *Curtis Publishing,* 374 F.2d 442 (2d Cir. 1967)." It held, however, that several mitigating factors in this case justified sweeping a year of violations under the rug.

The first of these purportedly mitigating factors was that for eight months or so before Golenbock &

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[11] A third step, taken *sub silentio,* was essentially to ignore all of M-GB's violations between February 19 and June 14, 1974. See numbered paragraphs 5 through 8, *supra.*

Barell took over as trial counsel, the defendants appeared not to be pressing for discovery. App. A, p. 13a. The apparent implication is that the district court should have treated discovery as a fresh problem in February 1974. What the Third Circuit seemed not to be aware of, however, and what the trial court of course did know (see numbered paragraph 5, *supra*) was that counsel for M-GB had already agreed, in June of 1973, to supply the information the defendants sought, so that there was no occasion to press the issue until M-GB's new lawyers ignored their obligation.

The second point of purported mitigation was that before February 19, 1974, M-GB had been represented by Mr. Kohn and the "delays or deficiencies in the answers caused by Kohn should not be attributed to M-GB's present counsel." As already shown, however, the "deficiencies" were, in fact as well as in law, the responsibility of M-GB, whether or not they were attributable to Golenbock & Barell.[12]

A third purportedly mitigating factor was the district court's lien decision which required M-GB to pay $50,000 if it wished to obtain Mr. Kohn's files. App. G, p. 180a. The consequence of that decision, according to the Third Circuit, was to make M-GB dependent upon reproduction of documents from the court file. The correctness of the lien decision was not questioned by the Third Circuit. It seemed, however, to feel that an outlay of $50,000 in pursuit of a $9 million antitrust claim was somehow inordinate. It altogether ignored, moreover, M-GB's quick and easy access to the court records in aid of its own case and its apparent en-

[12] See n. 4 and text thereat.

countering of difficulties only when it needed documents to satisfy its discovery obligations. See n. 10, *supra*.

The final purportedly mitigating factor was the Third Circuit's finding that Golenbock & Barell, when it commited itself on February 26, 1974, to answer the interrogatories by March 11, had not yet even seen them. There had been no occasion for the district court to make a finding on whether counsel had seen the interrogatories before the commitment to answer them, because the fact was not in issue. Mr. Wagman of Golenbock & Barell had stated in open court that back in 1973 the "firm had the interrogatories and in the capacity as general counsel to [M-GB] we were asked by lead counsel [Mr. Kohn] to prepare answers to certain of the interrogatories." (R. 2204-05). Even assuming it is proper for the reviewing court to make findings of its own, the Third Circuit's finding that Golenbock & Barrel had *not* seen the interrogatories is thus blatantly contradicted by the record.

As to the "crucial" June 14, 1974 violation, the Third Circuit found that it was the result of a "clerical error" by Golenbock & Barell's managing clerk. App. A, pp. 15a-16a. This finding as well had no evidentiary support and started out in the court's opinion as only an appellate *contention* by M-GB. App. A, p. 9a. The purported "clerical error" was the managing clerk's alleged omission of the June 14 date in preparing his schedule of calendar dates. The record shows that M-GB counsel claimed to have discovered that error on June 15. (R. 2993, 3140). Therefore, even if there was such an error, it was not the cause of the June 14 violation, for had it been, M-GB

would surely have mentioned it as the cause of their violation when on June 17 they sought defendants' consent to an extension of time, or when on June 19 they moved for an extension, or when on June 24 they responded to the motion to dismiss, or when on June 26 that motion was orally argued. Instead, their position was that the failure to comply with the June 14 deadline was "solely because of the inability to obtain the necessary information. . . ." (R. 2811).

Only in an affidavit in support of a motion for reconsideration on July 15, twelve days after the complaint had been dismissed, did M-GB counsel come up with the afterthought of the "clerical error". (R. 2993). Even then, moreover, M-GB did not proffer the answers to the interrogatories, thus further justifying the dismissal. See *Diapulse Corp.* v. *Curtis Publishing Co.,* 374 F.2d 442, 447 (2d Cir. 1967). The circumstances thus clearly supported Judge Higginbotham's conclusion, in denying reconsideration, that "the original Order of Dismissal was totally appropriate, required and justified." (R. 478-79).

REASONS FOR GRANTING THE WRIT

1. Only once since the adoption of the Federal Rules of Civil Procedure in 1938 has this Court undertaken to construe Rule 37. The Court held, in *Societe Internationale* v. *Rogers,* 357 U.S. 197, 212 (1958), that the rule does not authorize dismissal of a complaint for a party's noncompliance with a discovery order where that noncompliance was "due to inability, and not to willfulness, bad faith, or any fault of" the party. The "inability" that protected the party against dismissal was narrowly defined as "inability fostered neither by its own conduct nor by circumstances within its control." *Id.* at 211. The Court did not define the type or degree of "willfulness, bad faith . . . or fault" which would justify dismissal. However, by its dictum in *Link* v. *Wabash R.R.,* 370 U.S. 626, 636 (1962), dealing with the analogous problem of dismissal under Rule 41(b), the Court indicated that the dismissal sanction is not reserved only for those parties who openly flout the authority of the court and avow their own contumacy. Noncompliance which is "a product of neglect", the Court said in *Link,* may warrant dismissal of the complaint.

The Third Circuit in the instant case, while purporting to apply this Court's *Rogers* test, restated it to require, for a dismissal, that the noncompliance be "willful, conscious and intentional." App. A, p. 12a. On its assumption that M-GB's noncompliance with the June 14, 1974 deadline was the product of a "clerical error" by the firm's managing clerk (an assumption contradicted by the evidence), the Third Circuit was then able to hold that the dismissal of the complaint violated the *Rogers* test and was, therefore, an abuse of discretion.

The *Rogers* situation, where an external force actually prevents the party from complying, is comparatively rare. Even rarer is the case where the party announces an intentional refusal to comply. The vast majority of cases must be expected to fall within *Link's* "product of neglect" category. Even assuming that it was, indeed, the so-called "clerical error" that caused the noncompliance here, this case hardly fits within the *Rogers* description of "circumstances [not] within [M-GB's] control"; and it does fit precisely within the *Link* description of noncompliance "produced by neglect". Unless reviewed by this Court,

therefore, the Third Circuit's holding may well spell the demise of the dismissal sanction as an indispensable component of the carefully constructed discovery rules.

2. This case presents for the first time the question whether the scope of review of a Rule 37 dismissal is broad enough to permit the reviewing court to make findings of its own. As we have shown, the Third Circuit excused much of M-GB's pre-June 14, 1974 noncompliance on *an appellate finding* that its counsel, when he made the commitment on February 26, 1974, to answer the interrogatories by March 11, 1974, had not even seen them. As for the June 14, 1974 noncompliance, the court made *an appellate finding* that it resulted from a "clerical error". While neither of these findings is supported by the record and, indeed, both clearly contradict the evidence, we do not suggest that it is appropriate for this Court to review such factual issues on certiorari. We do, however, submit that it is highly appropriate for this Court to review the question whether the courts of appeals have any power at all to make findings of their own in their review of district court actions under Rule 37.

Professor Rosenberg, whose article [13] played so large a role in the 1970 revision of Rule 37,[14] concluded his section on "Flaws in the Courts' Administration of Rule 37" with the observation:

> "Rules, no matter how well conceived, will not enforce themselves. They will work only if judges

[13] Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 496 (1958).

[14] See Advisory Committee Note of 1970 to Amended Rule 37, 4A Moore, *Federal Practice*, § 37.01[8].

> confronted with the task have unwavering determination to make them work. There is a vital difference between a discretionary melioration of sanctions in response to mitigating circumstances, which is proper, and nullification of the rule because of antipathy for its ends or means, which is not. Due enforcement of this rule should not be sabotaged by judicial pernicketiness about its involving 'merely' procedural matters. Its purpose is too important to permit casual disregard." [15]

In light of these observations, it is eminently sensible that the decision whether or not to dismiss a complaint for noncompliance with a discovery order be left to the sound discretion of the district court, especially in a complex case such as this in which that court has lived through a long history of recalcitrance toward discovery and has repeatedly granted postponements and issued admonitions. The courts of appeals must, to be sure, be afforded jurisdiction to review a dismissal order, but the scope of that review has always been assumed to be "extremely narrow, confined solely to whether the trial court has abused its discretion," and only "clear" abuse of discretion has been assumed to justify a reversal. *Marshall* v. *Sielaff*, 492 F.2d 917, 918 (3rd Cir. 1974); *Spering* v. *Texas Butadiene & Chemical Corp.*, 434 F.2d 677, 680 (3rd Cir. 1970); *Kenney* v. *California Tanker Co.*, 381 F.2d 775, 778 (3rd Cir. 1967).

3. In deciding whether the plaintiffs' noncompliance with the discovery order may be attributable to "willfulness, bad faith, or . . . fault", so as to permit a dismissal of the complaint under *Societe Interna-*

[15] See, in general accord, 1959 Duke L. J. 278, 291.

tionale v. *Rogers,* it should be proper, if not indispensable, that the district court take into consideration the antecedent procedural history of the case.[16] By its holding that it was an abuse of discretion for the district court to consider that antecedent procedural history in the instant case, the Third Circuit has eliminated from consideration the only material which in most cases would be available for making the determination this Court has required. Unless the plaintiff, at the time of noncompliance with the order, should actually verbalize his defiance of the court, "willfulness, bad faith, or . . . fault" would be impossible to establish except by reference to the record of his accumulated discovery violations and his callousness to the court's repeated admonitions.

If one of the purposes of the 1970 revision of Rule 37 was "to encourage more frequent imposition of sanctions in cases in which there has been an abuse of the discovery rules",[17] this Court should review the judgment below and reinforce the authority of the district courts.

4. In substantial part, as we have shown, the decision below was based upon a conclusion that M-GB, having replaced its record counsel in February 1974, had cleansed itself of any taint resulting from the deficiencies of its conduct over the preceding year. The Third Circuit's conclusion in that respect was in ac-

[16] In affirming the Rule 41(b) dismissal in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962), this Court said:

> "And it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation . . ., that petitioner had been deliberately proceeding in dilatory fashion."

[17] 8 Wright, *Federal Practice & Procedure* 756.

cord with those Rule 37 cases before the 1970 revision which used the lawyer-client distinction as a device for nullifying the rule.[18] When a similar argument was offered against a Rule 41(b) dismissal, this Court, in *Link* v. *Wabash R.R.*, 370 U.S. at 633-34, gave it short shrift:

> "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent. . . ."

See also *Spering* v. *Texas Butadiene & Chemical Corp.*, 434 F.2d at 680, relying on *Link* and noting that:

> "Where plaintiff is himself an attorney the Supreme Court's words are the more strongly applicable."[19]

[18] See 1959 Duke L. J. 278, 291:

> "It is undeniable that the framers of the Rules contemplated that rule 37 should be an instrument of drastic action against those who would thwart the discovery process. The tendency, however, has been to withhold serious sanctions in return for promises by the recusant to comply at some future time. The reluctance to mete out the full measure of punishment that the circumstances might require is, in the main, attributable to hesitancy to harm an innocent litigant who might be victimized by the errors of his attorney, or to the hope that the suit might eventually be resolved on the merits, conditioned upon future compliance.
>
> "What is the net result of this diluted judicial application? The principal result is that rule 37 has been relegated too often to the station of 'merely another procedural technicality,' to be lived with or tolerated, rather than respected and observed."

[19] In this case, as shown *supra* p. 4 and n. 4 the officers and shareholders of Metropolitan, one of the corporate components of

Rare, indeed, is the violation of a discovery order for which responsibility cannot be placed upon the lawyer rather than the client. If, therefore, Rule 37 is to serve the purpose for which it was designed, this Court should review the judgment below and reaffirm the principle it settled as to Rule 41(b) in *Link*.

5. The four factors discussed above as relevant to the determination whether discovery misconduct should lead to dismissal—*i.e.*, the party's grossly negligent response to court orders, the total record of his discovery behavior, his responsibility for the conduct of his counsel, and the degree of the authority of the trial court as compared to a reviewing court—all combine to comprise a fifth and, we submit, most persuasive reason for granting the writ here sought.

Judge Higginbotham pointed out, in dismissing M-GB's complaint:

> "An underlying factor here is that a Court must be able to regulate and control in an orderly fashion the progress of discovery. . . . Sanctions become meaningless unless they are applied when circumstances demand them, though harsh they may be." App. E, p. 50a.

The court of appeals failed to recognize the obvious validity of these propositions. On the contrary, it dictated to trial judges that their discretion to impose the sanction of dismissal is so narrowly circumscribed as to be virtually non-existent. That message is not likely to be lost on such litigants as M-GB who derive advantage from usurping control of the pretrial sched-

M-GB, are practicing lawyers, and Golenbock & Barell is itself a stockholder of Golden Blades, the other corporate component, and one of the firm's partners is an officer and member of the board and executive committee of that corporation.

ule.[20] The court of appeals opinion, if permitted to stand, will undermine the power of trial judges to control the discovery process and will encourage abuses of that process by litigants.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 26, 1976

[20] Because of M-GB's tactics here, the court had already been forced to extend the "firm" trial date three times. (R. 1924, 1930, 2225-28, 2352-55). If, instead of dismissing the complaint, the court had again extended the deadline for answering the damage interrogatories, it would also have been forced to extend the trial date a fourth time. (R. 466, 474, 2442).

Supreme Court, U. S.
FILED
APR 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1558

NATIONAL HOCKEY LEAGUE, ET AL., *Petitioners,*

v.

METROPOLITAN HOCKEY CLUB, INC., and
GOLDEN BLADES HOCKEY, INC., *Respondents.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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v.

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GOLDEN BLADES HOCKEY, INC., *Respondents.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-2113/2118

No. 74-2113

IN RE: PROFESSIONAL HOCKEY ANTITRUST LITIGATION
(D.C. No. M.D.L. 119)

Metropolitan Hockey Club, Inc. and
Golden Blades Hockey, Inc., *Appellants*

No. 74-2114

WORLD HOCKEY ASSOCIATION, *et al.*
(D.C. Civ. No. 72-1995)

v.

NATIONAL HOCKEY LEAGUE, et al.
Metropolitan Hockey Club, Inc. and
Golden Blades Hockey, Inc., *Appellants*

No. 74-2115

WORLD HOCKEY ASSOCIATION, et al.
(D.C. Civ. No. 73-19)

v.

NASSAU SPORTS, etc., et al.
Metropolitan Hockey Club, Inc. and
Golden Blades Hockey, Inc., *Appellants*

No. 74-2116

WORLD HOCKEY ASSOCIATION, et al.
(D.C. Civ. No. 74-161)

v.

NASSAU SPORTS, etc., et al.,
Metropolitan Hockey Club, Inc. and
Golden Blades Hockey, Inc., *Appellants*

No. 74-2117

NASSAU SPORTS, a limited partnership,
(D.C. Civ. No. 74-162)

v.

GARRY PETERS, METROPOLITAN HOCKEY CLUB, INC., and
CHARLES L. ABRAHAMS
and
GOLDEN BLADES HOCKEY, INC., *Intervenor-Defendant,*
Metropolitan Hockey Club, Inc. and
Golden Blades Hockey, Inc., *Appellants*

No. 74-2118

NASSAU SPORTS, a limited partnership
(D.C. Civ. No. 74-163)

v.

GARRY PETERS, METROPOLITAN HOCKEY CLUB, INC., and
CHARLES L. ABRAHAMS
and
GOLDEN BLADES HOCKEY, INC., *Intervenor-Defendant,*

Metropolitan Hockey Club, Inc. and
Golden Blades Hockey, Inc., *Appellants*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

Argued May 15, 1975

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Opinion of the Court

(Filed February 23, 1976)

STALEY, *Circuit Judge.*

This is an appeal from an order of the district court granting defendants' motion to dismiss the action with prejudice for failure to comply with the discovery provisions of the Federal Rules of Civil Procedure and with the

court's related order. Appellants ask us to determine whether dismissal of their action was an abuse of discretion. Upon a thorough review of the record, we conclude that the district court did abuse its discretion by dismissing the case.

Before examining the facts, we find it essential and appropriate to outline the general background of this case.

In August 1972, the Philadelphia World Hockey Club, Inc. of the World Hockey Association (WHA) filed a broadbased antitrust suit against the Philadelphia Hockey Club, Inc., and other clubs comprising the National Hockey League (NHL). Subsequently, fifteen separate lawsuits were filed against the NHL. One of these actions, *World Hockey Association v. National Hockey League,* C.A. 72-1995, included the appellant, Metropolitan Hockey Club, Inc. (Metropolitan). All of the cases were consolidated in the Eastern District of Pennsylvania on October 10, 1972 in accordance with 28 U.S.C. §§ 1404(a) and 1407(a). In May 1973, Golden Blades Hockey, Inc. acquired all the assets of Metropolitan and agreed to prosecute and defend the antitrust actions in which Metropolitan was then involved.

In February 1974, the WHA and the NHL and their member teams—except Metropolitan and Golden Blades—reached a settlement of the antitrust suit. The settlement called for a dismissal of all respective claims against each other and the various individual defendants. However, the five actions to which Metropolitan and Golden Blades (jointly "M-GB") were parties were continued.

Between February and June 1973, both the WHA and the NHL parties served numerous discovery requests upon each other. Apparently, the WHA was delinquent in responding to the NHL interrogatories and NHL complained that some of the responses were inadequate and fell short

of any good faith compliance.[1] At a pre-trial conference and hearing on June 7, 1973, the district court directed the parties to negotiate to resolve their discovery disputes and report back to the court by June 25 regarding any discovery disputes that remained. On June 25, counsel for all parties wrote the court requesting additional time to negotiate their discovery problems. These discovery negotiations, as well as the settlement negotiations, continued through summer into the fall. By a series of stipulations, the parties postponed the deadline for completion of discovery to and including November 30, 1973. That fall, the court advised all parties that the case should be set for trial on March 18, 1974.

On February 19, 1974, all the NHL clubs and all the WHA clubs, except M-GB, agreed to settle their respective claims against one another and various individual defendants in each of the fifteen actions. A consent decree was entered by the court at that time terminating the litigation as to all plaintiffs other than M-GB. Until the settlement entered into on February 19, 1974, lead counsel for the plaintiffs was the law firm of Harold Kohn, P.A. Each WHA team had its own general counsel, but responsibility for overall management of plaintiff's litigation was the Kohn firm.

On February 20, 1974, the day after the consent decree, Golenbock & Barell, now in charge of the litigation for M-GB, and counsel for the NHL met with the judge to determine the final pre-trial schedule. At this conference, the court apprised the parties that March 18, 1974 was still the trial date and that all parties should do whatever necessary so that the trial would start on the announced date. Appellant at this time was attempting to gain access to

[1] These interrogatories were relative to the financial structure of Metropolitan. The answers, therefore, should have been more specific as required by Fed. R. Civ. P. 33(c).

files held by Harold Kohn, counsel for the WHA, in order to proceed with discovery. Kohn claimed a lien on the filed for unpaid services and costs of approximately one million dollars and refused to release the files to M-GB until he was paid. At a pre-trial conference on February 26, 1974, the court entered an order recognizing a lien in favor of the Kohn firm on "all papers relating to and arising out of this litigation and now under their control." The order also required M-GB to pay or post sufficient surety to satisfy in excess of $50,000 of the lien, holding that it "could be obligated to pay the total legal fees and related costs expended by WHA . . . [which] could approximate one million dollars." The effect of the order was to leave M-GB without copies of pleadings, orders, and other crucial documents pertaining to discovery.

At the February 26 conference, the court also considered M-GB's motion for a continuance of the March 18 trial date and granted it by extending the trial date to April 1 or April 8. The court then requested the parties to agree on a pre-trial schedule. Counsel for M-GB at this time agreed to answer defendants' interrogatories in two weeks, by March 11, 1974. At the time of this commitment, M-GB asserts that its counsel had not seen a 114-page set of interrogatories with multiple subparts aggregating 1,150 questions and did not realize the inherent difficulty in supplying answers.

The following morning, February 27, defendants began a series of depositions of every officer, director, and major shareholder of M-GB. Counsel for M-GB at conference with the court that afternoon strenuously protested defendants' intention to take simultaneous depositions, pleading that "I will never be able to answer [the interrogatories] by March 11th if I have to do that, and it is not fair and it isn't due process." The court rejected M-GB's plea and ordered simultaneously depositions to commence two days later on March 1, 1974.

On March 11, answers to defendants' interrogatories had not been filed. Counsel for M-GB wrote a letter to the court requesting an extension of time until March 18 to answer the interrogatories. On March 13, the NHL moved to dismiss the action for M-GB's failure to answer. A hearing was held the next day, and the court denied defendants' motion to dismiss, giving M-GB until March 18 to supply answers to the interrogatories and extending the trial date to April 15, 1974.

M-GB timely submitted their answers to the interrogatories on March 18. At a pre-trial conference on March 19, NHL informed the court that it intended to file a motion to compel supplementary answers. At this same conference, the court advised the parties that the trial date was to be extended from April 15 to September 16, 1974. On March 21, the NHL filed its motion compelling supplementary answers to certain interrogatories because it considered previous responses to be inadequate. This motion sought information regarding M-GB's capital structure. M-GB alleged that answers could not be given because the financial records necessary to provide answers were unavailable because they were in the possession of accountants and lawyers who had invoked liens on them. The motion also sought supplemental answers to fifty-six of the 1,150 interrogatories which involved computation of damages and requested that M-GB attribute specific damages including loss of profits to particular acts of the defendant that were monopolistic. Defendants' motion was argued on March 25, 1974, and on April 12, 1974, the court rendered its decision compelling supplemental answers.

In its order directing supplemental answers, the court also set forth six guidelines and three deadlines for providing these answers. It is this order that appellants contend caused them confusion in "targeting" the wrong date and led to the dismissal of the action. A substantial number of answers were to be filed by April 29, 1974. Another

set of interrogatories, which M-GB claimed it could not answer because of inadequate discovery, was to be answered no later than July 25, 1974. A third set of interrogatories, the fifty-six dealing with M-GB's damage claims, was to be supplemented by June 14, 1974.

On April 24, M-GB sought an extension of the April 29 deadline because the district court clerk's office, under the press of other court business, was unable to timely reproduce several hundred documents required in connection with the supplemental answers. The court extended the deadline to May 6. M-GB timely filed these answers on May 6. Included in these answers was some information pertinent to the interrogatories relating to damages which were not due until June 14.

On June 14, M-GB failed to file the supplemental answers. M-GB contends this failure was inadvertent in that the June 14 date had been erroneously omitted from their calendar schedule of dates and deadlines for pending discovery. M-GB argues that they confusingly juxtaposed the June 14 date with the district court's order fixing the July 25 deadline and failed to properly "target" June 14. They also claim that during the period between February 25, 1974 conference and June 14 they were devoting all of their manpower and resources to comply with defendants' "staggering discovery requests" and were unable to commence their own discovery until the second week of April. M-GB asserts that for six weeks prior to June 14, 1974, they pursued a busy deposition schedule in addition to devoting substantial attention to defendants' various motions for protective orders and many other aspects of this litigation.

On June 14, 1974, while attending an argument on cross-motions to compel responses to requests for admission and of defendants' motion for a protective order with respect to a deposition, defendants' counsel announced that

they would be filing a motion to dismiss. The next day, Saturday, June 15, M-GB's counsel reviewed its file and the pending motions and discovery proceedings and discovered the omission of the June 14 deadline from their calendar prepared by the firm's managing clerk. On Monday, June 17, the next business day, M-GB's local counsel hand-delivered a letter to defendants' local counsel requesting an extension of the June 14 date citing their reasons therefor and suggesting that the time for the supplemental answers to the damage interrogatories be extended to July 25, 1974, and, if not acceptable, that defendants suggest an alternative date. The following day, defendants' counsel advised that they would not agree to an extension and that the failure to supplement the answers on June 14 was the basis of the motion to dismiss alluded to at the June 14 argument.

On June 19, the NHL filed its motion to dismiss. Also at this time, M-GB filed a motion to extend the June 14 deadline to July 25. These two motions were argued on June 26, 1974, and the court on July 3 entered its order dismissing the actions with prejudice under Rule 37(b)(2)(C) and (d).[2]

Control of discovery proceedings is important so a just and speedy determination of the lawsuit can be reached. Rule 37 of the Federal Rules of Civil Procedure provides trial courts with the means and power to enforce compliance with the rules of discovery. The trial court may impose sanctions for failure to comply with an order compelling discovery. This rule gives a court great flexibility and broad discretion regarding what sanctions may be imposed. Rule 37 on its face imposes on a court an obligation to exercise reasoned discretion as to the alternative sanctions. Implicit in the rule is that the court in exercising its discretion should consider the full record before it. See *Diapulse Corp. of America v. Curtis Publishing Co.*, 374 F.2d 442 (2d Cir. 1967). After reveiwing the district court's opinions, we are left with some doubt as to whether other sanctions were considered. The opinion lacks any meaningful discussion regarding this matter. We are aware from our examination of the record that the trial court has been faced with a time-consuming and often frustrating array of events. Even so, it is incumbent on the court in exercising its reasoned discretion to review the possible use of an alternate sanction before it imposes the stringent sanction of dismissal. We find nothing disclosed in the district court's opinion that indicates that it in fact considered an alternative sanction.

[2] Rule 37(b)(2)(C) provides the sanction that: "An order . . . dismissing the action or proceeding or any part thereof . . ." may be entered by a court when a party fails to permit discovery.

The imposition of any sanction, although within the trial court's discretion, *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781 (3d Cir. 1974), must be considered in light of the Fifth Amendment's due process clause. *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958). The power of a court to compel production of evidence is limited when a party may be denied the opportunity to have the merits of his case adjudicated.

Because of this due process limitation, the Supreme Court has held that before the sanction of dismissal can be imposed, presence of such factors as willful disobedience, gross indifference to the right of the adverse party, deliberate callousness, or gross negligence must be found. *Societe Internationale, supra* at 212.

In 1970, Rule 37 was amended to allow for greater flexibility in imposing sanctions. The term "willfully" which was eliminated from the Rule had operated to characterize the type of conduct for which the sanction of dismissal could be imposed. The elimination of "willfully," however, has not changed the requirements set forth in *Societe Internationale*. We believe it is necessary that a trial court apply the guidelines set forth in *Societe Inter-*

nationale before imposing the sanction of dismissal. The Advisory Committee Notes pertaining to the change made in Rule 37(b) have made this plain:

> " 'Willfullness' continues to play a role along with various other factors, in the choice of sanctions. Thus the scheme conforms to Rule 37(b) as construed by the Supreme Court in *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958)."

Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 37 at 57 (Supp. 1976).[3]

We conclude that before imposing the sanction of dismissal, the trial court must find some willfulness, bad faith or fault when a party fails to comply with an order compelling discovery. *Societe* at 212. Simultaneously, the court must be convinced that the failure to comply was not due to any inability or accident. Therefore, the order of dismissal can stand only if the trial court found that M-GB's failure to comply with the order was willful, conscious and intentional. *Societe* at 212.

The district court found that M-GB had acted willfully and in bad faith by disregarding the court's order, by failing to meet other deadlines over a seventeen-month period and by not filing adequate answers. The court further found that M-GB exercised "flagrant bad faith" by the same conduct and also by not filing any motions until five days after the June 14 deadline.

First, we believe the court erroneously considered the circumstances that occurred over the seventeen months. We are mindful that the full record should be considered. *Diapulse Corp v. Curtis Publishing*, 374 F.2d 442 (2d Cir. 1967). However, there are several important considerations which mitigate M-GB's actions.

---

[3] See also 8 Wright & Miller, Federal Practice & Procedure § 2291 at 811-13 (1970).

The record plainly shows that no one was overly concerned with an expeditious hearing of the case prior to February 19, 1974. We do not criticize this since it is obvious that a settlement was possible and all parties were working toward this end. Although the district court found that the answers of the original plaintiffs filed to defendants' May 25, 1973 interrogatories were less than adequate and fell short of "minimal good faith compliance," it took no action on defendants' motion to compel supplementary answers because the parties were moving toward a possible settlement and hoped that any discovery matters could be solved mutually between the parties without further court intervention.

The parties worked on a settlement through the summer and fall of 1973 and also continued in their attempts to resolve the disputes as to discovery matters. During this time, the NHL made no Rule 37 motions seeking dismissal of the case, although many answers were not supplied while others remained inadequate. We are aware that the district court had urged the parties to solve their discovery problems without his help, and we make no attempt to minimize or question the efforts of those involved in completing the discovery. We simply point out that the period from February 2, 1973 to January 31, 1974 was spent primarily in negotiating discovery matters and attempting to settle the suit. Since no further demands for answers were made by the NHL during this period, we must assume that their concern with discovery prior to February 19, 1974 was subordinated to their primary interest in settling the litigation. We believe that the critical concerns with discovery develop only after M-GB's pronouncement that it was not going to be a party to any settlement.

Moreover, during the phase of the case prior to February 20, 1974, the WHA was represented by the law firm of Harold P. Kohn, P.A. Each WHA member team had its separate general counsel, but the responsibility for

managing and litigation of the antitrust action in behalf of all the plaintiffs was with the Kohn firm as lead counsel. Each of the teams' general counsel was to provide assistance to the Kohn firm in completing all discovery matters. The final responsibility for answering interrogatories was with lead counsel and in fact that Kohn firm did prepare many answers itself. Any delays or deficiencies in the answers caused by Kohn should not be attributed to M-GB's present counsel.

Appellant's attorneys, Golenbock & Barell, had been serving as its general counsel during this time. When they advised Kohn on or about January 15, 1974 that they would not agree to the settlement that was being worked out between th WHA and the NHL and on January 31 requested that Kohn make available all of his files pertinent to the pre-trial discovery, they met with a flat rebuff. When the district court upheld this refusal and M-GB was effectively denied access to Kohn's files, it was suddenly subjected to a heavy burden. It became necessary for M-GB to complete its discovery files laboriously copying the voluminous court records. The question of whether Kohn's files should have been made available to Golenbock & Barell is not an issue of this appeal, and we make no attempt to question the district court's judgment. However, M-GB was left with almost no discovery materials and it faced a complex antitrust case scheduled for trial in five weeks. We perceive this to be an onerous burden and another mitigating factor which the district court failed to consider.

It is plain that counsel for M-GB worked frantically to complete discovery within the deadlines set by the court. They were involved in taking simultaneous depositions and attempting to provide answers to innumerable interrogatories.[4] We question the judgment of M-GB's counsel in

[4] Leonard Wagman, a member of the law firm of Golenbock & Barell, filed a 144 paragraph motion for reargument and affidavit

committing himself to answer an enormous quantity of interrogatories by the March 11 date, especially when he had not yet seen them. The failure to submit timely answers led to defendants' first Rule 37 motion for dismissal. This record, however, does not disclose that the failure was intentional or willful. The district court apparently felt likewise for it denied defendants' motion for dismissal and extended M-GB's time to answer the interrogatories to March 18. These answers were timely submitted, but NHL claimed they were inadequate. Subsequently, on March 21, the defendants filed a motion to compel supplementary answers as to certain interrogatories concerning M-GB's capital structure and also answers involving the specific monopolistic acts.

We now come to the most crucial facts. Regarding the interrogatories that M-GB could not answer because of inadequate discovery, the district court ordered supplemental answers to be filed "when the necessary discovery has been completed and in any event not later than July 25, 1974." The answers dealing with damages were to be filed "whenever the data became available" and "in no event later than June 14, 1974."

M-GB missed the June 14 deadline. Defendants contend that this was a willful failure to file. To support this view, defendants suggest that appellants cannot rely on a "clerical error" as the reason for missing the date because M-GB never mentioned this fact in their brief in opposition to the dismissal motion, nor in oral argument on the motion. Defendants also allege that when appellants found out that they missed the deadline, they continued taking depositions and made no attempt to come forward with the

in which he averred that M-GB counsel was required to prepare for, attend, and defend simultaneous depositions on every business day between the February 27 conference and the March 11 deadline. They claim that some of these simultaneous depositions took place in separate cities.

answers. The transcript of oral argument, however, contains this response by M-GB's counsel to the court as to why they did not file a request for an extension of time before June 14:

> Mr. Wagman [M-GB counsel]: "Because we felt that we had to the extent that we had information available to use, we had supplemented those answers in May, and that by July 25th we were going to answer all the remaining supplemental—give the Court and our adversaries all the remaining supplemental answers. That was the deadline we had targeted, July 25th to supplement any answers we hadn't supplemented in May."

Moreover, when M-GB's counsel discovered the oversight on June 15, they made a request of defendants' counsel for an extension on the next business day, June 17.

Mr. Wagman pointed out to the district court that having devoted substantial time and energy on this case, he would not have knowingly or willfully disregarded the deadline. His assertion finds support in the fact that there were only fifty-six out of 1,150 interrogatories to be answered. Furthermore, M-GB was in the process of taking depositions that would provide the necessary information to answer the fifty-six interrogatories. They claim that without these depositions many of the supplementary answers could not be made.

After carefully reviewing the record, we conclude that there is insufficient evidence to support a finding that M-GB's failure to file supplemental answers by June 14, 1974 was in flagrant bad faith, willful or intentional. We believe that under all of the circumstances the extreme sanction of dismissal was unwarranted. Extenuating factors were present. M-GB's counsel exercised an enormous effort after they took control of the case in attempting to complete the discovery matters within a brief period. On

the other hand, we must caution M-GB and their counsel that upon remand of this case they must be extremely diligent in completing discovery and in not breaching reasonable deadlines. We do not imply that upon remand, should M-GB fail to promptly proceed with discovery and timely file adequate responses to the interrogatories, dismissal under Rule 37 or other alternative sanction might not be appropriate. We hold that the sanction of dismissal was improper under the circumstances of this case.

We have considered appellant's other arguments and find no merit in discussing them at this time.

The judgment of the district court dismissing the complaint will be reversed and the case remanded for further proceedings.

HUNTER, *Circuit Judge, dissenting.*

I respectfully dissent.

Judge Staley has, in his majority opinion, fully set forth the sequence of events including the various discovery deadlines that were established—deadlines that were not met by the appellant.

Various sanctions were available to the district court. At the end, that court drew the line and dismissal was chosen.

Admittedly, this is the most severe sanction but, in my view, its use, under the circumstances here, did not constitute an abuse of discretion.

I would affirm.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Present: STALEY, ROSENN and HUNTER, *Circuit Judges*

Judgment

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed July 3, 1974, be, and the same is hereby reversed and the cause remanded for further proceedings. Costs taxed against appellees.

ATTEST:

/s/ Thomas F. Quinn,

February 23, 1976 *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2113, 74-2114, 74-2115, 74-2116, 74-2117, 74-2118

In Re: PROFESSIONAL HOCKEY ANTITRUST LITIGATION

METROPOLITAN HOCKEY CLUB, INC., and
GOLDEN BLADES HOCKEY, INC., *Plaintiffs-Appellants*

NATIONAL HOCKEY LEAGUE AND ITS MEMBER CLUBS,
Defendants-Appellees

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, STALEY, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, and GARTH, *Circuit Judges*

The petition for rehearing filed by defendants-appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Illegible

Dated: March 18, 1976 *Judge*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-2113/74-2118

In Re: PROFESSIONAL HOCKEY ANTITRUST LITIGATION

METROPOLITAN HOCKEY CLUB, INC., and
GOLDEN BLADES HOCKEY, INC., *Appellants*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 25, 1976.

/s/ Illegible
Circuit Judge

Dated: April 1, 1976

UNITED STATES DISTRICT COURT,
E. D. PENNSYLVANIA.

July 3, 1974.

M. D. L. No. 119.

Civ. A. Nos. 72-1995, 73-19 and 74-161 to 74-163.

In Re: PROFESSIONAL HOCKEY ANTITRUST LITIGATION

63 F.R.D. 641 (1974)

* * * * * * * * * *

Perry S. Bechtle, Alan M. Lerner, Barry F. Greenberg of Cohen, Shapiro, Polisher, Shiekman & Cohen, Philadelphia, Pa., and Leonard W. Wagman and Michael C. Silberberg of Golenbock & Barell, New York City, for plaintiffs, Metropolitan Hockey Club, Inc. and Golden Blades Hockey, Inc.

Edwin P. Rome and Richard P. McElroy of Blank, Rome, Klaus & Comisky, Philadelphia, Pa., for all defendants except Atlanta Hockey, Inc. and Nassau Sports.

Harry L. Shniderman, Herbert Dym and Bingham B. Leverich of Covington & Burling, Washington, D. C. for defendant National Hockey League.

Edward Bennett Williams, Harold Ungar, Steven M. Umin and Richard M. Cooper of Williams, Connolly & Califano, Washington, D. C., for all defendants except National Hockey League, Atlanta Hockey, Inc. and Nassau Sports.

Morris R. Brooke of Drinker, Biddle & Reath, Philadelphia, Pa., for defendant, Nassau Sports.

Edward W. Mullinix and Arthur H. Kahn of Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., and S. Phillip

Heiner and A. Stephens Clay of Kilpatrick, Cody, Rogers, McClatchey & Regenstein, Atlanta, Ga., for defendant, Atlanta Hockey, Inc.

HIGGINBOTHAM, District Judge.

Opinion

I.

INTRODUCTION

Plaintiffs, Metropolitan Hockey Club, Inc. and Golden Blades Hockey, Inc. (hereinafter referred to as "M-GB"), are now before this Court pursuant to timely motions by defendants, Nassau Sports, Atlanta Hockey, Inc., and the National Hockey League and its member clubs, who seek against plaintiffs the ultimate supreme penalty—the irrevocable termination and dismissal with prejudice of plaintiffs' suit. The defendants' last motion for dismissal was filed on June 19, 1974; yet this is not the first time plaintiffs have been near death's door in this litigation. Thrice before M-GB has been warned with the most precise language possible that their conduct of non-compliance with the Court's critical orders had brought them teetering on the precipice of dismissal. On June 14, 1974, because of additional and willful non-compliance, M-GB were thrust from their precarious precipice into the irretractable abyss below where dismissal is certain and where immediate dismissal is required as a matter of law.

The motion of dismissal with prejudice is granted with full recognition of its terminal and dire consequences to plaintiffs, but in the course of this litigation, M-GB have received every possible discretionary ruling in their favor so that they could continue to compete in this arena of litigation. The discretion was often granted most reluctantly and solely because of the Court's recognition that the opposing chief defense counsel were in every respect true superstars with extraordinary experiences and unlimited

financial resources. Of course, plaintiffs in antitrust litigation play an important role as private attorneys-general for the vigorous enforcement of the antitrust laws, but even with that imprimatur there comes a point where Courts are not required to exceed the "patience of Job." Thus, there is a time, even in this hockey litigation, when the "penalty box" is inadequate to enforce the rules of the game. Tragically for their clients, plaintiffs have reached that point and dismissal is required both as a matter of discretion and also as a matter of law.

II.

HISTORY OF THE CASE

A. *General Background.*

For maximum comprehension of the compelling reasons motivating and indeed necessitating the Court's disposition in this matter, a detailed chronicle of the events preceeding this motion is essential. Examining the totality of the facts herein presented, the imposition of the sanction of dismissal pursuant to Fed.R.Civ.P. 37(b)(2)(C)[1] is entirely appropriate and justified under the circumstances.

---

[1] Fed.R.Civ.P. 37 provides in relevant part:

"Failure to Make Discovery: Sanctions

* * * * *

"(b) Failure to comply with order.

* * * * *

"(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * * * *

"(C) An order striking out pleadings or parts thereof, or

The genesis of this litigation dates back to August 18, 1972, when the Philadelphia World Hockey Club, Inc. of the newly established World Hockey Association ("WHA") launched a massive, wide-ranging antitrust suit against the Philadelphia Hockey Club, Inc. of the older, prestigious National Hockey League ("NHL") and the member clubs of that league. This single civil action ultimately cascaded to number fifteen separate lawsuits, all of which were consolidated here in the Eastern District of Pennsylvania in accordance with either 28 U.S.C. § 1404(a) [2] or 28 U.S.C. § 1407(a) [3]. One of the actions transferred to this Court came from the Central District of California on October 11, 1972 and was captioned as the World Hockey Association v. National Hockey League,

staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . ."

[2] 28 U.S.C. § 1404 states in pertinent part:

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[3] 28 U.S.C. § 1407(a) reads:

"When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded."

C.A. 72-1995. Included in that action as a plaintiff, and a defendant on the counterclaim, was Metropolitan Hockey Club, Inc. ("Metropolitan").

One facet of this mushrooming litigation culminated in the Court's filing an 124-page Opinion on November 8, 1972, less than three months after the initial suit was instituted and less than two months after the plaintiffs' motion for a preliminary injunction was lodged on September 19, 1972. Upon posting of a $2.5 million bond, this Opinion granted the plaintiffs (whose presence at this time encompassed Metropolitan) a preliminary injunction against enforcement of the NHL's controversial "reserve clause." See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Ins., 354 F.Supp. 462 (E.D.Pa. 1972). This ruling by the Court constituted just one of the multitudinous directives issues during the course of this complex litigation.

Beginning in January 1973 the WHA's conducting of this litigation was coordinated primarily by Harold E. Kohn, Esquire, as lead counsel, and his law firm, Harold E. Kohn, P. A. Arguably, this representation embraced Metropolitan by reason of its status as a member of the WHA. Metropolitan's position nonetheless as to which counsel has represented its interest throughout these proceedings has been by no means entirely consistent, but evidently Metropolitan adheres to Emerson's philosophy that "a foolish consistency is the hobgoblin of little minds." Some of Metropolitan counsel's history, as well as its financial troubles has been further highlighted and reported in the Court's Opinion of In re Profesional Hockey Antitrust Litigation (Multidistrict Litigation), 371 F.Supp. 742 (E.D.Pa.1974).

B. *The Discovery Travail.*

The defendant NHL and its member clubs propounded and served interrogatories on Metropolitan and the other

plaintiff's on February 2, 1973, more than sixteen months ago. In accordance with Fed.R.Cov.P. 33(a)[4], Metropolitan's answers or objections thereto should have been provided by March 5, 1973. There was neither the timely submission of any responses or objections nor did Metropolitan request an extension of time so that its legal position would be adequately safeguarded.

The plaintiffs moved the Court for leave to amend their complaint on March 15, 1973. In order for the defendants' outstanding interrogatories to be tailored and conformed to any allegations contained in the new complaint, the defendants consequently redrafted the original interrogatories. Except for the defendants' efforts to dovetail the interrogatories to the specific paragraphs of the recent

[4] Fed.R.Civ.P. 33 states in relevant part:

"Interrogatories to Parties.

"(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. "Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory."

complaint, the substance of the first set of defendants' interogatories was not significantly altered. This amended set of interrogatories was docketed on March 30, 1973. Even if the earlier deadline of March 5, 1973 could be discounted, Metropolitan's responses to the amended interrogatories would be due on April 30, 1973, giving plaintiffs the longer 45-day span permitted under Fed.R.Civ.P. 33(a). On April 30th as on March 5th, Metropolitan and the other plaintiffs had not replied nor had an extension of time been sought.

Approximately three months after the original interrogatories had been served, Metropolitan on May 4, 1973 moved for an extension of time, stating:

> "Plaintiffs' counsel believes that it can file objections to defendants' interrogatories (approximately 170 pp.) and can substantially comply with the remainder of defendants' discovery requests by May 25, 1973. . . ." [Plaintiffs'] Motion for Extension of Time at 2.

Defendants strenuously opposed this motion in a memorandum filed on May 7, 1973. On May 10th the Court granted the plaintiffs an extension until May 14th for noting their objections to the interrogatories, and until May 25th for providing answers. (N.T. of May 10, 1973 at 44-45.)

On May 15, 1973, a day past the deadline, the plaintiffs supplied their objections to the interrogatories which had been outstanding since February 2nd. In relevant part, the plaintiffs stated that they

> "Object to all of the NHL defendants' interrogatories —consisting of 120 separately numbered paragraphs and literally hundreds of separate subparagraphs and sub-subparagraphs—in their entirety on the ground that the interrogatories indiscriminately sweep too

broadly and are unduly burdensome, expensive and inefficient. Indeed, the length and breadth of scope of these interrogatories is merely another manifestation of the NHL's attempt to suppress competition by excessively burdening legal recourse by the injured WHA plaintiffs." (Plaintiffs' Objections to Defendants' Amended First Set of Interrogatories at 1-2.)

However, there were some objections to specific categories of interrogatories. Defendants on May 18, 1973 moved to compel answers to their amended first set of interrogatories.

On May 25, 1973, Metropolitan submitted its longly awaited answers to interrogatories which had been initially propounded on February 2, 1973, almost four months before. Metropolitan's answers *in their entirety* were embodied in a single paragraph:

> "Plaintiff Metropolitan Hockey Club, Inc. hereby incorporates, as its own answers, the answers to these same interrogatories filed by the World Hockey Association ('WHA') and other WHA plaintiffs and the documents produced by the WHA and other WHA plaintiffs, from which documents the NHL defendants may derive or ascertain answers with substantially the same effort and burden as may the WHA plaintiff hereby answering the interrogatories."

Even this "generous", all-encompassing answer did not comply with Fed.R.Civ.P. 33(a) in that it was unsigned and unsworn. Moreover, in contravention of Fed.R.Civ.P. 33(c),[5] the documents adverted to were wholly unspecified.

[5] Fed.R.Civ.P. 33(c) provides:

> "Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

Finally, many of the interrogatories were geared to obtaining information unique to Metropolitan or a specific club of the WHA, namely, interrogatories 2(a), 2(c), 2(d), 2(e), 2(g), 2(k), 2(m), 2(n), 2(o), 2(r), 2(s), 2(t), 2(v), 2(w), 2(x), 2(y), 2(z), 20(b), 21(d), 22(b), 23(c), 26(b), 30(b), 31, 32, 33, 34, 35, 36(e), 36(f), 36(i), 36(j), 36(k), 36(*l*), 36(m), 36(n), 36(*o*), 36(p), 36(q), 37(b), 37(f), 37(h), 37(i), 38, 39, 40, 41(c), 41(d), 41(e), 41(f), 41(g), 41(h), 41(n), 41(*o*), 41(p), 41(q), 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52(b), 52(c), 52(d), 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 73, 75, 76, 77, 78, 79, 80, 82, 83, 84, 92, 96, 97, 98, 99, 100, 101(f), 101(g), 103, 104, 105, 107, 108, 109, 110, 111, 112, 116, 117 and 118. The damages allegedly sustained by Metropolitan as well as interrogatories relative to its financial structure were covered and this information was specifically requested. By the most liberal construction imaginable of the discovery provisions of the Federal Rules of Civil Procedure Metropolitan's "answer" after four months fell drastically short of any minimal good faith compliance.

On June 4, 1973, the defendants moved the Court to compel answers from plaintiffs. Around this period of time, however, the parties were realistically broaching the possibilities of settlement of this litigation. Thus the Court deferred taking any action on defendants' latest motion to compel, along with several other discovery motions, and the parties were going to endeavor to negotiate, hopefully

obviating the necessity for any further Court intervention, at least on the purely discovery matters.

Negotiations continued throughout the summer and Fall of 1973. The Court nonetheless advised the parties during the Fall that the case was scheduled for trial commencing March 18, 1974 in the event the extensive and protracted settlement sessions proved unsuccessful.

Pursuant to 28 U.S.C. § 1407(a), the Judicial Panel on Multidistrict Litigation transferred on January 4, 1974 several cases to the Eastern District of Pennsylvania from the Eastern District of New York, the Southern District of Texas, and the Central District of California. Among the parties included in those actions were Golden Blades Hockey, Inc. of the WHA ("Golden Blades") and Nassau Sports of the NHL ("Nassau").

At this juncture it would be appropriate to clarify the relationship of Golden Blades and Metropolitan. Some of this history is more amply described in another Opinion of the Court previously alluded to, which is reported at 371 F.Supp. 742 (E.D.Pa.1974), but the salient facts can be briefly summarized here. In early 1972 the WHA assigned to Metropolitan what the Court here shall generally designate as the New York franchise. When the hockey season began in the Fall of 1972, after paying only two player payrolls Metropolitan found itself in the position of being unable to meet its financial obligations including further payment of its players. Therefore the WHA interceded and assumed Metropolitan's financial obligations until May 11, 1973.

On May 11, 1973 Metropolitan was reorganized and became now Golden Blades. Metropolitan owns 200,000 of the 1,040,000 outstanding shares of Golden Blades Common Stock. Moreover, some of the same principals originally involved with Metropolitan are also associated with Golden Blades. When the 1973-1974 hockey season commenced in the

Fall of 1973, after October 18, 1973 the WHA once again had to step in and financially assume responsibilities for the management and operation of this franchise.

One of the critical inquiries in this case, insofar as it pertains to Metropolitan and Golden Blades, will therefore be whether any of the damages allegedly sustained by either or both of these clubs were due primarily, if not solely, to the undercapitalization of the corporations. In other words, were the financial troubles plaguing Metropolitan and Golden Blades (hereinafter referred to as "M-GB"), *caused* by the purported monopolistic conduct and practices of the NHL and some of its member clubs, particularly Nassau, the New York Rangers and the Madison Square Garden Center of New York City.

On February 19, 1974 all of the sixteen member clubs of the NHL and eleven of the thirteen WHA teams (every club except for M-GB) agreed to settle all the antitrust claims and terminate the litigation. This settlement package was formally embodied in a Consent Decree which was approved by the Court at that time. Consequently, the only two plaintiffs remaining in the litigation were Metropolitan and Golden Blades or M-GB.

M-GB were going to prosecute the antitrust issues on their own behalf and would be represented by the New York City law firm of Golenbock and Barell. Leonard W. Wagman, Esquire and Michael C. Silberberg, Esquire, of that firm would be primary counsel. On February 20, 1974 the Court met with M-GB counsel and the attorneys representing the defendants to hammer out the final pretrial schedule so that the trial on the merits and the permanent injunction could begin as planned on March 18, 1974. At the February 20th session the defendants apprised the plaintiffs that there must be answers to the interrogatories which were served on February 2, 1973 (N.T. of February 20, 1974 at 10-11).

At another pretrial conference held on February 22, 1974 M-GB counsel, speaking through Mr. Wagman, stated to the Court unequivocably:

> "I will answer the interrogatories, every one, if it is not objectionable. *We have the information, we will answer them.*" (Emphasis added.) (N.T. of February 22, 1974 at 66.)

On February 26, 1974, in another pretrial conference with the Court, the NHL counsel proposed that a hearing be conducted the next day, February 27th, on the outstanding motion to compel answers and, furthermore, that M-GB be required to file their answers by March 4th. (N.T. of February 26, 1974 at 11.) The Court inquired if the parties could confer and mutually agree on a pretrial schedule. After discussing the discovery questions outside the presence of the Court, the parties reported back that a hearing on the defendants' motion would be unnecessary since the M-GB had agreed to answer the interrogatories by March 11th, approximately two weeks later. This proposal was accepted and adopted by the Court. (N.T. of February 26, 1974 at 14-15 and 20.) At the February 26th session in deference to M-GB the trial date of March 18th was tentatively moved back to the week of April 1st or the week of April 8th. (N.T. of February 26, 1974 at 20-21.)

Once again M-GB did not honor their obligation to answer the interrogatories by March 11th. Instead of filing a motion on March 11th for an extension of time, M-GB wrote a letter to the Court on March 11th requesting an extension of time until March 18th to answer the interrogatories.

On March 13th the defendants moved to dismiss the action for M-GB's failure to answer the interrogatories. At a hearing scheduled the next day on March 14th, the Court denied the defendants' motion to dismiss and M-GB was

given until March 18th to supply their answers. Nonetheless, in denying the motion, the Court admonished M-GB:

> "I consider the memorandum of defendants in support of the motion to dismiss the claims of Metropolitan Hockey and Golden Blades Hockey to be a matter of substance and not to be frivolous in any way.
>
> "The motion is necessarily addressed to the Court's discretion, and I rely on the cases which are cited in Professor Moore's treatise, Section 37.03[2.-5].
>
> "As I review the cases which are cited under that category at 37-65 for cases in which dismissal was granted, there are some cases where, as an exercise of discretion, the courts have granted dismissals in cases of great substance and of substantial significance to the parties.
>
> "This is the plaintiff's second time before me where what I understood our pretrial schedule to be had been breached by plaintiffs.
>
> "While I think it would be permissible to grant defendant's motion to dismiss as a matter of discretion, I do not grant it at this time, but I can not imagine on a similar circumstance if such a motion is made for any subsequent breach of the pretrial schedule that plaintiffs would be able to successfully defend against a motion to dismiss." (N.T. of March 14, 1974 at 46-47.)

On March 18th, M-GB submitted their answers to the year-old interrogatories. At a pretrial conference on March 19th the Court met with counsel and disclosed that the trial date for April increasingly seemed more jeopardized for a number of reasons and suggested that the parties consider a trial date of September 16, 1974. (N.T. of March 19, 1974 at 3-4.) During the conference the defendants were given until March 21st to file any motions, the plaintiffs were to

respond by March 23rd and the matter would be listed for argument on March 25th.

On March 21st the defendants filed an extensive motion compelling supplementary answers to interrogatories which the defendants considered inadequately answered. When the motion was argued on March 25th the Court reminded M-GB of the significance of complying with deadlines:

> "THE COURT: Mr. Silberberg [one of the M-GB counsel], let me tell you I was really distressed to get the call I got on Friday from Mr. Greenberg [one of the M-GB counsel] asking for an ex-parte extension in terms of your filing your memorandum.
>
> "Dates mean something to me as a trial judge. When a lawyer is in my office and says he is going to do certain things by certain dates, I expect for them to be done. If he has to pull ten lawyers or three lawyers or four lawyers—I am not dealing with students in moot court. I am not dealing even with parties who are representing paupers to the extent of Community Legal Service, and they are understaffed. I am dealing with someone who says he is competent to handle an antitrust case, and I have given your colleague two or three extensions, almost against my better judgment, because I wanted to make sure I had done everything possible to see full justice, if possible, even though he may have been tardy and even though he had made commitments, and to have gotten that call on Friday was disturbing to me to the extent that I have not been in the ten years I have been here because I don't get constantly tested like that.
>
> "I want you to tell Mr. Wagman and your colleagues if they want to play in this league, they have got to act like lawyers, and when you tell me you are going to do something on a date, I expect for it to be done.

> "I was in here on Saturday. I come in on Saturdays and Sundays and work nights when it is necesssary. You have got to do the same.
>
> "So, that I just hope that it will not happen again because you are at the precipice." (N.T. of March 25, 1974 at 20-21.)

The Court in addition cautioned M-GB counsel at that March 25th hearing about the urgency of providing financial data of their clients so that defendants could adequately prepare their case. The Court examined M-GB counsel on this precise point:

> "THE COURT: I want to ask you this question, looking down the line: Is there a point where you might be precluded from a line of damages because the defendants don't have access to the documents to defend on damages?
>
> "MR. SILBERBERG: Your Honor, with respect to these particular records, these financial records the books of account that the WHA has and the stock-minute book which Mr. Marcus has, I addressed myself to that particular question in my papers, and we said that it was unreasonable as they had asked for us to attempt to obtain those records by April 5th, which is in a week, but we would make efforts, and we are going to make efforts to get them back. If we didn't get them back by June 15th, then there could be the type of order that Your Honor had suggested." (N.T. of March 25, 1974 at 29.)

Moreover, the Court admonished M-GB counsel:

> "Well, I suggest you look over Moore's Commentary. You can get a preclusion of theories if you play around. Now, you gentlemen told me in chambers that you have got a case worth several million dollars. If I

had a case worth several million dollars, I wouldn't deal with it lightly in terms of getting everything. I mean, if you are trying a nickel-and-dime case where you could collect $20 or $20,000, then you make $20 or $20,000 efforts, but on a case which apparently counsel fees alone have run $1,750,000, not to you, but to others on the plaintiffs' side, you have got to watch it carefully because I just think you are going to be in deep trouble." (N.T. of March 25, 1974 at 29-30.)

In a pretrial order dated April 1, 1974, the Court set July 15, 1974 as the last day for all the parties to complete the taking of depositions. On April 12, 1974 the Court filed a Memorandum Order (Pretrial Order No. 32) ruling on defendants' motion for supplementary answers. Generally, the Pretrial Order required M-GB to supplement a substantial number of answers by April 29, 1974. Notwithstanding the statement of M-GB counsel on February 22, 1974 that he had all the necessary information to answer the interrogatories, M-GB's principal argument as to why their answers were inadequate (of course not conceding that they were in fact inadequate) was that they had not been able to complete the necessary discovery.[6]

---

[6] In this regard one should note that when the Judicial Panel on Multidistrict Litigation transferred several cases from the Eastern District of New York on January 4, 1974, one of the Judges sitting on the Panel, Edward Weinfeld, dissented, mainly because he believed those cases there were in a posture that they could be soon tried:

"I dissent insofar as the Nassau Sports v. Gary Peters, et al. [369 F.Supp. 1117] (E.D.N.Y. 72 Civ. 1086) and Nassau Sports v. Norman Ferguson, et al. [369 F.Supp. 1117] (E.D. N.Y. 72 Civ. 1132) actions are concerned. Upon the argument of this motion it appeared that discovery in these matters was well advanced in the original district of commencement of suit and counsel represented that the cases were ripe for trial there. In the circumstances, a transfer would not be 'for the convenience of parties [nor] . . . promote the just and efficient conduct' of such action as required by 28 U.S.C., section 4107 [1407]. I would leave these actions where they are.

Bearing in mind that contention of M-GB, the Court required that some of the interrogatories "which the plaintiffs are unable to answer now due to inadequate discovery must be answered when the necessary discovery is completed and in any event no later than July 25, 1974," which was ten days after all discovery had to be terminated. (Memorandum Order of April 12, 1974 at 2.) Thus there would be some information provided to the defendants for the first time (almost two years after the litigation had begun) and at a time when they (the defendants) would be precluded from engaging in further discovery.

There was one group of interrogatories however that the plaintiffs were expressly directed to supplement on June 14, 1974, and this collection of interrogatories dealt with questions specifically related to damages sustained by M-GB.[7] The June 14th deadline was imposed so that the defendants would have at least a month upon receipt of the supplementary answers to conduct further discovery should it prove necessary. In the Court's view, the issues of damages and causation went to the core of the defendants' defense. As heretofore mentioned, fiscally M-GB were not your typical solvent organizations and some of their financial difficulties may have been internal. The Court stated in its Memorandum Order at 7-8:

"12. *Failure to Provide Specific Answers to Questions Relating to Damages.*

"The Court has previously advised the parties informally about the merits of this litigation. One area of crucial concern will be the damages sustained by

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[7] These were interrogatories 20(b); 21(d), 22(b), 23(c), 26(b), 30(b), 31(c)-(f), 33(d)-(*o*), 35(g)-(i), 36(c), (e), (f), (m)-(p), 37(c)-(e), 38(b)(1)-(6), (c), (d), 39(i)-(p), 41(a)-(b), (d)-(f).

Metropolitan and/or Golden Blades, assuming *arguendo* the causal nexus linking NHL and/or some of its member clubs is established by the plaintiffs. The Court finds that the answers thus far provided to interrogatories in this section are totally inadequate, particularly with regard to any kind of *itemization* of damages.

"At this stage of the discovery, for whatever the reasons, the plaintiff might not be in a position to provide, with the specificity necessary, the precise information demanded. Accordingly, consistent with Guideline 5, *supra,* plaintiffs will be directed to supplement these answers whenever the data become available and in no event later than June 14, 1974. In this regard the plaintiffs are forewarned that the Court will be amenable to entertaining any motions under Fed.R.Civ.P. 37 should such information not be forthcoming by June 14, 1974."

The bulk of the supplementary answers of the plaintiffs were due on April 29, 1974. On April 17th, five days after the April 12th Memorandum Order, M-GB for the first time since they had been in the case ordered reproduction of documents contained in the official Court file which they asserted were necessary to supplement the answers. On April 24, 1974, Alan M. Lerner, Esquire, one of M-GB counsel, wrote the Court a letter in lieu of filing a motion, seeking an extension from April 29th to May 8th because of the Clerk of Court's inability to immediately Xerox the hundreds of documents suddenly requested by plaintiffs.[8] This extension was vigorously opposed by the defendants in a letter to the Court. The Court on April 29th however "reluctantly" granted an extension until May 6, 1974.

[8] We had two persons from the Clerk's Office work overtime and on one Saturday to comply with plaintiffs' urgent request for the Xeroxing of hundreds of documents.

On May 6, 1974, the plaintiffs timely supplied their supplementary answers. Included in those answers were responses to interrogatories 33(g), 33(h), 33(i), and 33(j)-(k). These interrogatories were ones which related to damages and were due by June 14th. On June 14th *all* of the answers which touched upon damages and were cited in footnote 7, *supra,* were required to be supplemented. However, notwithstanding the unambiguous warning by the Court on April 12th, M-GB had filed absolutely nothing. Five days *later* M-GB on June 19th filed a motion to amend Pretrial Order No. 32, the Memorandum Order of April 12, 1974, requesting the Court "to designate July 25, 1974 the date by which plaintiffs must file supplemental answers to all of defendants' Interrogatories." (Plaintiffs' Motion to Amend Pre-Trial Order No. 32 at 2.) To grant M-GB's request would in effect deprive the defendants of any opportunity to have discovery on the information provided on July 25, 1974.

On June 19, 1974 the defendants also filed this motion to dismiss for M-GB's failure to supplement their answers relating to damages and other financial matters.

Plaintiff's motion to amend Pretrial Order No. 32 and defendants' motion to dismiss were argued before the Court on June 26, 1974.

C. *The Damage Interrogatories.*

Since only a few of the damage interrogatories were supplemented by June 14, 1974 the Court will review the scope of the answers tendered by M-GB on March 18, 1974.

In M-GB's complaint at paragraph 28(a) they alleged that the defendants had combined and conspired "to threaten prospective players and coaches with 'blacklisting' by the NHL if they became associated with the members of the WHA." The defendants therefore asked M-GB to describe each and every instance when such "blacklist-

ing" had occured. In interrogatory 20(b), the defendants inquired further:

> "as to each such instance [of blacklisting], state whether you claim that you suffered monetary damage as a result thereof and, if so, state the total amount of such damage and explain how it was computed."

M-GB responded to interrogatory 20(b) by stating:

> "These threats of blacklisting resulted in each of the above-named players, other than Peters and Fergeson, and other players presently unknown to Metropolitan and Golden Blades deciding not to execute contracts with Metropolitan, Golden Blades and other WHA teams. This was one of several factors which prevented Metropolitan and Golden Blades from successfully entering the sub-market known as Major League Professional Hockey and from paying spectators, lucrative television and radio contracts, as well as substantial profits from various ancillary rights and precluded Metropolitan and Golden Blades from developing the New York franchise of the WHA to its fullest potential—that of being the most valuable franchise in the WHA. The effects of this damage is ongoing since Metropolitan and Golden Blades would have reasonably expected to earn substantial profits for many years to come and the New York franchise would have represented a substantial capital asset, all of which has been destroyed by the anti-competitive and monopolistic acts of the NHL defendants. Accordingly, Metropolitan and Golden Blades cannot state with certainty the amount of damages resulting from and attributable to these particular acts but believe such damages to be not less than $3,000,000."

This kind of general form language was given to virtually all these interrogatories relating to damages. To cite

another example, paragraph 28(d) of M-GB's complaint alleged that defendants had combined and conspired "to disparage the WHA and its member clubs to coaches and players who either had signed or were considering or might consider contracts with plaintiffs." In Interogatory 22(a), M-GB were asked to describe each such instance and in Interrogatory 22(b), as in interrogatory 20(b), they were required to disclose what damages had been sustained. With a slight variation in language, the same format was followed by M-GB in this answer:

> "Upon information and belief, this disparagement of the financial ability of the WHA resulted in Metropolitan and Golden Blades being required to post enormous sums as guaranties for the salaries of players who had been signed, thus depriving Metropolitan and Golden Blades of substantial cash needed for their operations. This was one of several factors which prevented Metropolitan and Golden Blades from successfully entering the sub-market known as Major League Professional Hockey and from obtaining substantial profits from paying spectators, lucrative television and radio contracts, as well as substantial profits from various ancillary rights and precluded Metropolitan and Golden Blades from developing the New York franchise of the WHA to its fullest potential—that of being the most valuable franchise in the WHA. The effects of this damage is ongoing since Metropolitan and Golden Blades would have reasonably expected to earn substantial profits for many years to come and the New York franchise would have represented a substantial capital asset, all of which has been destroyed by the anti-competitive and monopolistic acts of the NHL defendants. Accordingly, Metropolitan and Golden Blades are unable to state with certainty at the present time, the precise amount of such damages resulting from and attributable to these particular acts, but believe such damages to be not less than $3,000,000."

Extracting one fragment of M-GB's answer to interrogatory 22(b) typifies the dilemma confronting the defendants. M-GB responded that "this disparagement of the financial ability of the WHA resulted in Metropolitan and Golden Blades *being required to post enormous sums as guaranties for the salaries of players who had been signed, thus depriving Metropolitan and Golden Blades of substantial cash needed for their operations.*" (Emphasis added.) Candidly, after more than one and one-half years since the complaint was filed in this action M-GB should have knowledge of what were these "enormous sums" they were required to post as guaranties. The defendants have no way whatsoever of ascertaining what these sums were except through discovery of M-GB. These kinds of facts are purely within the knowledge of M-GB and only M-GB.

Interrogatory 21 corresponded to paragraph 28(c) of M-GB's complaint wherein they alleged that defendants had combined and conspired to devise a system of selling rights to players who have signed with plaintiffs to the NHL hockey club operating in the territory of the player's WHA club in order to better effectuate defendants' coercive efforts to disrupt the player's contract with the WHA hockey club. Interrogatory 21(d) called for M-GB's revealing the damages it had sustained. Again, M-GB's answer was as follows:

> "The actions of the NHL in transferring rights to such players was one of several factors which prevented Metropolitan and Golden Blades from successfully entering the sub-market known as Major League Professional Hockey and earning substantial profit from paying spectators, lucrative television and radio contracts, as well as substantial profit from various ancillary rights and precluded Metropolitan and Golden Blades from developing the New York franchise of the WHA to its fullest potential that of being the most valuable franchise in the WHA. The effect of

> this damage is ongoing since Metropolitan and Golden Blades would have reasonably expected to earn substantial profits for many years to come and the New York franchise would have represented a substantial capital asset, all of which has been destroyed by the anticompetitive and monopolistic acts of the NHL defendants. Accordingly, Metropolitan and Golden Blades are unable to state with certainty at the present time the precise amount of such damages resulting from and attributable to these particular acts, but believe such damages to be not less than $3,000,000."

Interrogatory 23 referred to allegations in paragraph 28(e) of M-GB's complaint that there had been "false and misleading press releases." Accordingly, in interrogatory 23(e), defendants asked:

> "as to each such press release referred to, state whether you claim that you suffered monetary damages as a result thereof and, if so, state the total amount of such damage and explain how it was computed."

And M-GB's answer was:

> "The issuance of such false and misleading press releases was one of several factors which prevented Metropolitan and Golden Blades from entering the submarket known as Major League Professional Hockey and from obtaining substantial profits from paying spectators, lucrative television and radio contracts, as well as substantial profit from various ancillary rights and precluded Metropolitan and Golden Blades from developing the New York franchise of the WHA to its fullest potential that of being the most valuable franchise in the WHA. The effects of this damage is ongoing since Metropolitan and Golden Blades would have reasonably expected to earn substantial profits for many years to come and the New York franchise would have represented a substantial

capital assets, all of which has been destroyed by the anticompetitive and monopolistic acts of the NHL defendants. Accordingly, Metropolitan and Golden Blades are unable to state with certainty at the present time the precise amount of such damages resulting from and attributable to these particular acts, but believe such damages to be not less than $3,000,000."

The Court will not unduly lengthen this Opinion by quoting again M-GB's answers, but they are illustrative of the kinds of information M-GB would provide to defendants after a year and a half of discovery. Form answers were provided to interrogatories 26(b), 30(b), 31(c)-(f), 35(g)-(i), 36(*o*)-(p), 37(c)-(e), 38(b)(1)-(6), 38(c), and 39(*l*)-(p). Some of the other interrogatories in this group were not even answered in the slightest.

The only answers of M-GB which contained the kind of specificity that could be of some use to the defendants came in answers to interrogatories 33(g)-(k), which were supplemented on May 6, 1974.

D. *Other Inadequate M-GB Answers.*

Excluding those answers which had to be supplemented by July 25, 1974 even though many such answers went to the financial structure and operations of M-GB, and examining only those answers which M-GB were directed to supplement by May 6th, many of those were inadequate.

Interrogatories 34(s)-(u) were to be answered by May 6th. Interrogatory 34 generally corresponded to paragraph 38(c) of M-GB's Complaint which alleged that unlawful acts of defendants will continue to cause plaintiffs to "negotiate for the sale of the rights to broadcast plaintiff's hockey games on radio and television at far less favorable terms then the actual and reasonable value of such broadcasts."

Interrogatories 34(s)-(u) asked:

"(s) state the total amount of monetary damage which you claim you have suffered as of the end of the last full month prior to the date on which your answer to this interrogatory is filed as a result of being forced, due to the alleged unlawful acts of defendants, to sell the right to broadcast hockey games or radio and television at less than the actual and reasonable value of such broadcasts;

"(t) state the total amount of monetary damage which you claim you will suffer after the end of the last full month prior to the date on which your answer to this interrogatory is filed as a result of being forced, due to the alleged unlawful acts of defendants, to sell the right to broadcast hockey games on radio and television at less than the actual and reasonable value of such broadcasts and explain in detail how said amount was computed;

"(u) identify (or submit a copy of) all documents which support or are otherwise relevant to said allegation in paragraph 38(c) of the Complaint or which refer to, relate to or reflect any of the information called for in this interrogatory, and identify each person having knowledge of any such information."

On March 18, 1974 M-GB gave no answer at all to interrogatories 34(s)-(u). Instead, in their Memorandum of Metropolitan Hockey Club, Inc. and Golden Blades Hockey, Inc. in Opposition to Defendants' Motion to Compel Supplementary Answers to Interrogatories at 6, M-GB stated:

"M-GB concedes that it failed to file answers to 34(s) (t) and (v) [sic] and agrees to provide answers to these interrogatories in the supplemental answers they will hereafter file."

On May 6th M-GB's answers to interrogatories 34(s)-(u) were as follows:

> "34. (s) (t) (u) The total amount of monetary damage suffered by Metropolitan and Golden Blades as a result of being forced, due to the unlawful acts of defendants, to sell the right to broadcast hockey games on radio and television at less than the actual and reasonable value of such broadcasts represents at the very least, the difference between monies actually received by Metropolitan and Golden Blades, set forth in the documents heretofore produced and identified in answer to interrogatories 34(a)-(*l*) and the monies received by the New York Rangers and New York Islanders for the right to broadcast and televise their games. Metropolitan and Golden Blades will be in a position to more specifically identify these amounts when they have completed their discovery and will file supplemental answers in accordance with the Court's guideline 5."

M-GB have almost entirely avoided answering interrogatory 35(e) which relates to paragraph 38(d) of their complaint wherein it was alleged that defendants' unlawful conduct caused plaintiffs to "suffer a reduction in the anticipated and actual revenue from the sale of tickets for both preseason and regular games." Interrogatory 35(e) asked M-GB to "explain how each of the claimed number of tickets, the claimed prices, and the claimed amounts set forth in answer to interrogatory 35(d) was computed." M-GB have a tendency to circumvent giving a specific answer by offering a broad conclusionary answer to several subparagraphs and thus not answering each particular aspect of the question.

M-GB were similarly evasive in answering interrogatory 44 which dealth with whether they had any policy as to the number of NHL players the plaintiffs would attempt to

sign to a contract for the WHA 1972-1973 season or for any subsequent season. M-GB in answers to interrogatories 107(a)-(d) and 108(a)(1), (2) and (b) have disregarded providing dates as to when certain loans or escrow deposits were made.

III.

Discussion

The leading Supreme Court authority construing Fed.R. Civ.P. 37 is Societe Internationale v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), where the Court held, *inter alia,* that "[f]or purposes of subdivision (b)(2) of Rule 37, we think that a party 'refuses to obey' simply by failing to comply with an order." *Id.* at 208. 78 S.Ct. at 1094. Thus whether a party can be subjected to sanctions is not contingent upon a prior finding of *willfulness,* though some showing of willfulness may be necessary if the severe sanction of dismissal is invoked by the Court. See 4A Moore's Federal Practice ¶ 37.03[2.-1] at 37-55 to 37-56 (2d ed. 1974). The Supreme Court in *Rogers* elaborated on this delineation by noting that "Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to *willfulness, bad faith, or any fault of petitioner.*" 357 U.S. at 212, 78 S.Ct. at 1096. (Emphasis added)

The 1970 Amendments to Rule 37 by substituting "failure" for "refusal" sought to clarify any ambiguity that may have existed due to *Rogers, supra,* and to minimize the problems of construction which had troubled the Courts. See Advisory Committee Note of 1970 to Amended Rule 37, 4A Moore's Federal Practice ¶ 37.01[8] at 37-23 (2d ed. 1974). See, also, 4A Moore's Federal Practice ¶ 37.01[8] at 37-27 and ¶ 37.-03[2.-1] at 37-51 to 37-52 (2d ed. 1974).

The Court of Appeals for the Third Circuit has acknowledged the importance of parties engaging in good faith discovery and fully answering interrogatories which have been propounded to them, with the failure to do so resulting in the imposition of the sanction of dismissal. In Mangano v. American Radiator & Standard San Corp., 438 F.2d 1187, 1188 (3d Cir. 1971), the Court remarked:

> "Motions to dismiss were made in all four cases on the basis of plaintiffs' failure to file answers to interrogatories. Answers were required by orders to which the plaintiffs had consented. Time for answering had been extended. The district court indicated that, under the circumstances present here, the actions merited dismissal pursuant to Fed.R.Civ.P. 37(b)(2)[C] and 37(d) for failure to make responsive, and in some instances any, answers to proper interrogatories."

The lower Court Opinion clearly underscored the significance of imposing a sanction of dismissal, particularly where answers to interrogatories are "*totally inadequate and fail to provide essential information critical to the determination of which, if any, of the many plaintiffs in the present litigation are entitled to recover damages.*" (Emphasis added.) Philadelphia Housing Authority v. American Radiator & Standard San Corp., 50 F.R.D. 13, 15 (E.D.Pa.1970). The Court continued at a later point by stating:

> "In light of the flagrant disregard by plaintiffs of the discovery requirements of the Federal Rules of Civil Procedure and of the Order of this Court, the Court would be fully justified if, in the exercise of its discretion, it were to dismiss the claims of the present plaintiffs on the basis under Rule 37(b)(2)[C] or 37(d). Brookdale Mill, Inc. v. Rowley, 218 F. 2d 728 (6th Cir. 1954); Fond Du Lac Plaza, Inc. v. Reid, 47 F.R.D. 221 (E.D.Wis.1969); Shepard v. General Motors Corporation, 42 F.R.D. 425 (D.N.H.1967); *Accord,* Hastings v. Maritime Overseas Corporation, 411 F.2d 1201 (3d Cir. 1969); Diapulse Corporation of America v. Curtis Publishing Co., 374 F.2d 442 (2nd Cir. 1967); United States of America for the Use of Weston & Brooker Co. v. Continental Casualty Co., 303 F.2d 91 (4th Cir. 1962); Brady v. Hearst Corporation, 281 F.Supp. 637 (D.Mass.1968). *Such action is particularly appropriate in complex antitrust litigation like that now before the Court where efficient and effective discovery procedures are essential to orderly adjudication.* Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2nd Cir. 1964)." *Id.* at 18-19. (Emphasis added)

[3] The Court fully appreciates the harshness of the sanction of dismissal and does not lightly or cavalierly invoke it here. In an analogous context the Court is guided by the language of the Court of Appeals for the Second Circuit when, while expounding on the severity of the imposition of the judgment of default for failure of the parties comply with discovery orders, it commented that such a severe sanction must be "tempered by the careful exercise of judicial discretion to assure that its imposition is merited." Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 614 (2d Cir. 1964). However, unless there is complete disclosure by the plaintiffs of all responsive and relevant information bearing on certain essential interrogatories pertaining to damages, the defendants will be afforded no opportunity to prepare their defense, particularly when one of the key elements of that defense will be predicated upon negating or reducing the type and amount of damages which plaintiffs contend are directly attributable to the conduct of the defendants. We know that each and every day some corporations fail solely because of their own inadequate financial capitalization regardless of whether they exist in a milieu of Sherman Act violations. Thus, it was

imperative that defendants have sufficient data to differentiate whether the plaintiffs' failures were attributable to plaintiffs' financial inadequacies or to defendants' purported anti-competitive acts. Effective discovery is exceedingly vital so that defendants are enabled to prepare their cases *before* trial as opposed to being required to wait until the actual trial before the weaknesses or the strengths of the opponents' cases become known and are made apparent.

Courts today do not condone the "surprise" approach to discovery whereby at the latest possible moment the parties reveal the substance of their cases. If the discovery process is abused or allowed to be frustrated by the parties, then the entire pretrial procedures and the discovery provisions of the Federal Rules of Civil Procedure can be turned into a mockery. Time deadlines are imposed for valid reasons and there are prescribed procedures by which the time periods can be enlarged *if done in a timely fashion.* An underlying factor here is that a Court must be able to regulate and control in an orderly fashion the progress of discovery. Plaintiffs' counsel in the instant case are not inexperienced and just out of law school. Instead they are seasoned attorneys who know and comprehend the intricacies of federal practice and the importance of discovery in protracted litigation. Sanctions become meaningless unless they are applied when the circumstances demand them, though harsh they may be. After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, *viz.*, June 14, 1974, they failed to perform and compounded that

noncompliance by waiting until five days afterwards before they filed any motions. Moreover, this action was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed.R.CivP. 37. If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied.

In the alternative to applying the harsh sanction of dismissal, the defendants would be entitled to have certain facts taken as established under Fed.R.Civ.P. 37(b)(2)(A) and Fed.R.Civ.P. 37(d), and/or the entering of an Order pursuant to Fed.R.Civ.P. 37(b)(2)(B) precluding M-GB from offering proof at trial on the information pertaining to damages which was specifically solicited through the interrogatories.

Fed.R.Civ.P. 37(b) provides in relevant part:

* * * * * *

"(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence."

See, also, Philadelphia Housing Authority v. American Radiator & Standard San. Corp., *supra,* 50 F.R.D. at 19; McMullen v. Travelers Insurance Company, 278 F.2d 834 (9th Cir. 1960), cert. denied, 364 U.S. 867, 81 S.Ct. 110, 5 L. Ed.2d 89 (1960); Iaconelli v. Anchor Lines, Ltd., 51 F.R.D. 144, 147 (E.D.Pa. 1970); R. De Bouard & Cie v. S. S. Ionic Coast, 46 F.R.D. 1 (S.D.Texas 1969); and Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16 (S.D.N.Y.1966).

If, among other facts, it is taken as established that neither Metropolitan nor Golden Blades suffered any ascertainable damages as a result of the policies or conduct of any of the defendants, or if the plaintiffs are precluded from introducing evidence at trial on the question of damages, then as a matter of law, the defendants are entitled to judgment in their favor. See, e. g., Association of Western Railways v. Riss & Co., 112 U.S.App.D.C. 49, 299 F.2d 133 (1962).

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA

NOV. 8, 1972

Civ. A. Nos. 72-1661, 72-1807, 72-1902, 72-1906 and 72-1995.

PHILADELPHIA WORLD HOCKEY CLUB, INC.

v.

PHILADELPHIA HOCKEY CLUB, INC., ET AL.

PHILADELPHIA HOCKEY CLUB, INC.

v.

JOHN MCKENZIE ET AL.

JOHN MCKENZIE

v.

PHILADELPHIA HOCKEY CLUB, INC., ET AL

SPORTS CENTREPOINT ENTERPRISES, LTD., ET AL.

v.

NATIONAL HOCKEY LEAGUE ET AL.

WORLD HOCKEY ASSOCIATION ET AL.

v.

NATIONAL HOCKEY LEAGUE ET AL.

[351 FEDERAL SUPPLEMENT]

* * * * * * * * * *

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Arthur Morse, Chicago, Ill., for Chicago Blackhawk Hockey Team, Inc.

Harold E. Kohn, P. A. by Harold E. Kohn, Steven E. Haberfeld, Aaron M. Fine, Arthur Kaplan, Philadelphia, Pa., for John McKenzie.

Jerome H. Torshen, Chicago, Ill., for Sports Centrepoint, and others.

Sommer, Tinkham, Barnard & Freiberger by William C. Barnard, Indianapolis, Ind., for Chicago Blackhawk Hockey Team, Inc.

HIGGINBOTHAM, District Judge.

I.

INTRODUCTION

In 1917, the National Hockey League was born with Montreal and Toronto as its only members. In 1924, Boston was added, followed in 1926 with Chicago, Detroit and New York. In 1967, Los Angeles, Philadelphia, Pittsburgh, California, Minnesota, St. Louis entered the League and in 1970 Buffalo and Vancouver. In 1972, Nassau (New

York) and Atlanta joined this now famous League. Since 1966, the National Hockey League has received in excess of $36,000,000 for the sale of the rights to play major league professional hockey in their league. When in 1970 the National Hockey League admitted Vancouver and Buffalo, each of these two new clubs paid in excess of $8,000,000 for the acquisition of the minor professional league clubs in their locality and for distribution to National Hockey League clubs.[1]

Thus, from what in 1917 was a relatively minor sports attraction, the National Hockey League has skated into the 1970's to a position of substantial wealth, power, broad spectator interest, international recognition and many superstars, all crescendoing into huge profits for both its owners and players.

One writer observes:[2]

> "What has happened is this: the intrinsic speed and excitement of hockey has made it the game of the second half of this century."

Maybe in 1922 when the Supreme Court decided the baseball case, hockey was also, as Mr. Justice Holmes then described baseball, primarily an effort to give exhibitions with profits and interstate commerce contacts as mere incidentals. But today, as I review the instant record, hockey is primarily a multi-state, bi-national business, where the *fundamental* motive is the making of money. From its multiple interstate contacts it is a business in commerce subject to the federal anti-trust laws.[3]

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[1] *See* generally Findings of Fact 117 to 126, *infra*.

[2] Hockey Illustrated, November 1972, Stan Fischler, p. 10.

[3] The U. S. Supreme Court has never had to rule as to whether professional hockey is a sport operating in inter-state commerce and is therefore subject to the antitrust law. Thus, hockey does not have the exemption status decreed more than 50 years ago for

Despite the thousands of words uttered on this record by all parties about the glory of the sport of hockey and the grandeur of its superstars, the basic factors here are not the sheer exhilaration from observing the speeding puck, but rather the desire to maximize the available buck.

Since 1971, the World Hockey Association (hereinafter referred to as WHA)[4] has attempted to enter major league

baseball in Mr. Justice Holmes' famous opinion—Federal Base Ball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922). I hold that hockey is not exempt from the federal anti-trust law, that it is subject to these laws just as are vaudeville shows, boxing, football, basketball, and golf. *See* H. B. Marienelli, Ltd. v. United Booking Offices, 227 F. 165 (S.D.N.Y. 1914) (Vaudeville); United States v. Shubert, 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279 (1955) ("legitimate" theatrical attractions); United States v. International Boxing Club, 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290 (1955) (Boxing); Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); Haywood v. National Basketball Association, 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (Mr. Justice Douglas, in his capacity as Circuit Justice); Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049, 1060 (C.D.Cal.1971); Washington Professional Basketball Corp. v. National Basketball Association, 147 F.Supp. 154 (S.D.N.Y.1956); Deesen v. Professional Golfers' Association, 358 F.2d 165 (C.A. 9 1966), cert. denied, 385 U.S. 846, 87 S.Ct. 72, 17 L.Ed.2d 76 (1966). For an earlier case pertaining to hockey, *see* Peto v. Madison Square Garden Corp., 384 F.2d 682 (S.D.N.Y.1958); in Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728, the majority said: "Other professional sports operating interstate—football, boxing, basketball, and *presumably hockey* and golf—are not so exempt . . . ." from the federal anti-trust laws. (92 S.Ct. 2099, 2112 (1972).) (Emphasis added.)

[4] Because we have a collage of cases wherein some of the plaintiffs are players who desire to play with the World Hockey Association and in other cases the plaintiffs are either World Hockey Association or National Hockey League teams, for purposes of convenience we will normally use WHA to refer to (1) World Hockey Association, (2) World Hockey Association Teams, and (3) players such as Bobby Hull and John McKenzie desiring to play with the World Hockey Association teams.

professional hockey to become a real competitor in this field where the National Hockey League[5] (hereinafter referred to as NHL) has for so long held a total monopolistic position as the sole supplier of major league hockey competition. The basic issue is whether through their reserve clause, affiliation agreements, and market power dominance, the National Hockey League has violated the federal antitrust laws and if such a violation is found, whether the WHA is entitled to relief at this preliminary injunction stage.

After a careful review of this most detailed record[6] and the extensive briefs and proposed findings of fact, I find, for the reasons noted below, that for the National Hockey League players whose current contracts expired in September, 1972,[7] the National Hockey League violates the Sherman Act, Section 2,[8] in its efforts to preclude those players from joining WHA teams; accordingly the WHA is entitled to preliminary injunctive relief.

I would like to note my appreciation to all counsel for the most diligent manner in which they have pursued their discovery and litigation in this case. In fact, their performance has been a model for the entire legal profession as to the rational way in which able counsel can meet difficult problems in litigating with obvious vigor a preliminary injunction case where time, if not of the essence, is at least critical because any unnecessary delay by counsel or the court could create a substantial injury to some of the

[5] NHL refers to either the National Hockey League or the National Hockey League Clubs.

[6] The 200 exhibits encompass more than 2,000 pages—and the briefs and proposed findings of fact exceed 500 pages.

[7] See pages 507-508, *infra*, for analysis of the category of contracts which are held here to violate the Sherman Act.

[8] See pp. 504-505, *infra*.

parties. If this case could be decided solely on the basis of the talent and diligence of counsel, the parties would be in perfect equipoise.

The original complaint was filed in Philadelphia on August 18, 1972. Since then, the parties have had extensive discovery, meeting with extraordinary dispatch difficult deadlines. They have filed detailed pre-trial memoranda and proposed pre-trial orders and amendments in support of numerous motions to remand, to dismiss, and for partial summary judgment. For one phase of this litigation pertaining to whether one case should be remanded to a Chicago state judge, we had extensive detailed arguments on the afternoon of September 27, 1972 and at 9:21 that evening, I dictated my opinion from the bench—from which no appeal was filed.

Though originally some phases of the case were argued as motions for partial summary judgment and motions to dismiss, on October 10, 1972 the parties agreed that the record was closed and that I ". . . may consider all of the matters on the preliminary injunction [aspects] which have been [also] submitted on behalf of the [motions for] summary judgment." Transcript, October 10, 1972, 148-9. The last exhibit was filed on October 24, 1972 pursuant to the court's request for additional information.

Since the record has been closed as to the preliminary injunction phase and the record might contain some material facts which are in dispute, I am declining to rule on the summary judgment motions. Instead I am deciding the case on the preliminary injunction phase with all of the facts (whether disputed or not) being resolved in the findings of fact, *infra*, and in the opinion. In accordance with Rule 52 of the Federal Rules of Civil Procedure, this entire opinion, including the discussion, constitutes my Findings of Fact and Conclusions of Law, and any pro-

posed Findings of Fact and Conclusions of Law inconsistent with those not here found are hereby rejected.[9]

II.

Findings of Fact

General Findings as to Jurisdiction and Parties

1. Five separate actions are consolidated before this Court on this proceeding. They are:

a. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc. et al., C.A. 72-1661, complaint originally filed in this Court on August 18, 1972.

b. Philadelphia Hockey Club, Inc. v. John McKenzie, et al., C.A. 72-1807, removed from the Court of Common Pleas of Philadelphia County on September 13, 1972, pursuant to 28 U.S.C. § 1441.

c. John McKenzie v. Philadelphia Hockey Club, Inc., et al., C.A. 72-1902, complaint originally filed in this Court on September 26, 1972.

d. Sports Centrepoint Enterprises, Ltd., et al. v. National Hockey League, et al., C.A. 72-1906, transferred from the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a).

e. World Hockey Association, et al. v. National Hockey League, et al., C.A. 72-1995, transferred from the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1404(a).[10]

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[9] There are still perhaps a couple of open issues in this case which are not disposed of by this opinion such as the petition to remand to the Philadelphia state court. I will delay ruling on those few remaining open issues until a further pre-trial conference with all parties.

[10] Even though no answer has been filed by the defendants in this transferred action, pursuant to a stipulation of counsel, it was

2. Philadelphia World Hockey Club, Inc. (hereinafter "Philadelphia Blazers"), plaintiff in C.A. 72-1661, is a corporation organized under the laws of the State of New Jersey with its principal place of business in Philadelphia, Pennsylvania.[11]

3. Sports Centrepoint Enterprises, Ltd., (hereinafter "Winnipeg Jets"), plaintiff in C.A. 72-1906, is a corporation organized under the laws of the Province of Manitoba with its principal place of business in Winnipeg, Manitoba, Canada. (Complaint and Answer in C.A. 72-1906, ¶ 3a.)

4. Chicago Cougars Hockey Club, Inc., (hereinafter "Chicago Cougars"), plaintiff in C.A. 72-1906, is a corporation organized under the laws of the Province of Manitoba with its principal place of business in Chicago, Illinois. (Complaint and Answer in C.A. 72-1906, ¶ 3b.)

5. John McKenzie, (hereinafter "McKenzie"), plaintiff in C.A. 72-1902, is an individual and a citizen of Canada, residing at Boston, Massachusetts. (Complaint in C.A. 72-1902, ¶ 3; Complaint and Answer in C.A. 72-1807, ¶ 2.)

6. World Hockey Association, (hereinafter "WHA"), a plaintiff in No. 72-1995, is a non-profit corporation organized and existing under the laws of the State of Delaware, with its main office located in Santa Ana, California. WHA was formed in 1971 to operate a league of professional hockey clubs and to promote the interests of its individual member clubs. WHA has member franchises in cities and states throughout the United States and Canada. (Complaint in C.A. 72-1995, ¶ 3.)

7. The following plaintiffs in C.A. 72-1995 are all WHA franchise holders, and are corporations organized under

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agreed that my decision on the motions in the other related actions pending before me would be dispositive of the issues raised by this suit.

[11] The Philadelphia Blazers are also named as a defendant in C.A. 72-807, along with James L. Cooper, President of the Blazers.

the laws of the state or province indicated, with a place of business similarly indicated for each defendant:

a. Edmonton World Hockey Enterprises, Ltd., Alberta, McDonald Hotel, Edmonton, Alberta, Canada.

b. Cleveland World Hockey Association Club, Ohio, 3715 Euclid Avenue, Cleveland, Ohio.

c. Houston Hockey Club, Inc., Ohio, San Houston Coliseum, 810 Bagby, Houston, Texas.

d. Los Angeles Sharks, Inc., California, 3939 South Figueroa Street, Los Angeles, California.

e. Midwest Saints, Inc., Minnesota, Metro Square, St. Paul, Minnesota.

f. New England Professional Hockey Club, Inc., Massachusetts, 17 Lobby Street, Boston, Massachusetts.

g. Metropolitan Hockey Club, Inc., New Jersey, Statler Hilton Hotel, 7th Avenue and 33rd Street, New York, New York.

h. Ontario National Hockey Teams, Inc., Ontario, P.O. Box 1358 Station B, Ottawa, Ontario, Canada.

i. Le Club de Hockey Les Nordiques, Inc., Quebec, Colisee de Quebec, Quebec 3, Quebec, Canada. (Complaint in C.A. 72-1995, ¶ 4.)[12]

8. National Hockey League, (hereinafter "NHL"), defendant in C.A. 72-1661, 72-1902, 72-1906 and 72-1995, is an unincorporated nonprofit association with its principal place of business in Montreal, Canada. From the time of its organization, the membership of the NHL has consisted of member clubs engaged in the staging of professional

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[12] Also named as plaintiffs in the transferred California case are the Blazers, Winnipeg Jets, and Chicago Cougars, movants in this proceeding and described more fully above.

hockey games throughout the United States and Canada through a league of professional hockey clubs based on franchises covering specific geographical territories. (Complaint and Answer in C.A. 72-1661, ¶ 4; Exhibit P-3, Arts. I & II.)[13]

9. The following defendants in C.A. 72-1661, 72-1902, 72-1906 and 72-1995, are all corporations organized under the laws of the State or Province indicated immediately following each such defendant, with a place of business as indicated:

a. Boston Professional Hockey Association, (hereinafter "Boston Bruins"), Massachusetts. (Complaint and Answer in C.A. 72-1661, ¶ 5.)

b. Charles O. Finley and Company, Inc., (hereinafter "California Golden Seals"), holds the NHL franchise for Oakland, California. (Complaint and Answer in C.A. 72-1661, ¶ 6.)

c. Chicago Blackhawk Hockey Team, Inc., (hereinafter "Chicago Blackhawks"), Illinois, 1800 W. Madison Street, Chicago, Illinois. (Complaint and Answer in C.A. 72-1661, ¶ 7.)

d. Detroit Hockey Club, Inc., (hereinafter "Detroit Red Wings"), Michigan, 5920 Grand River, Detroit, Michigan. (Complaint and Answer in C.A. 72-1661, ¶ 8.)

e. California Sports, Inc., (hereinafter "Los Angeles Kings"), California, 3900 West Manchester Boulevard, P.O. Box 485, Inglewood, California. (Complaint and Answer in C.A. 72-1661, ¶ 9.)

f. The Hockey Club of Minnesota, Inc., (hereinafter "Minnesota North Stars") now known as Northstar

[13] The defendants named in Findings of Fact 8 and 9 are also counter-defendants in No. 72-1807.

Financial Corporation, holds an NHL franchise in Bloomington, Minnesota. (Complaint and Answer in C.A. 72-1661, ¶ 10.)

g. Le Club de Hockey Canadien, Inc., (hereinafter "Montreal Canadiens"), Quebec, 2312 St. Catherine Street West, Montreal, Quebec, Canada. (Complaint and Answer in C.A. 72-1661, ¶ 11.)

h. Madison Square Garden Center, Inc., (hereinafter "New York Rangers"), holds an NHL franchise for New York, New York. (Complaint and Answer in C.A. 72-1661, ¶ 12.)

i. Philadelphia Hockey, Inc., (hereinafter "Philadelphia Flyers"), Philadelphia, Pennsylvania. The Spectrum, Pattison Place, Philadelphia. (Complaint and Answer in C.A. 72-1661, ¶ 14.)

j. Pittsburgh Penguin Partners, a Limited Partnership, (hereinafter "Pittsburgh Penguins"), hold an NHL franchise for Pittsburgh, Pennsylvania. (Complaint and Answer in C.A. 72-1661, ¶ 14.)

k. St. Louis Blues Hockey Club, Inc., (hereinafter "St. Louis Blues"), Missouri, 5700 Oakland Avenue, St. Louis, Missouri. (Complaint and Answer in C.A. 72-1661, ¶ 15.)

l. Maple Leaf Gardens, Ltd., (hereinafter "Toronto Maple Leafs"), Ontario, 60 Carlton Street, Toronto, Ontario, Canada. (Complaint and Answer in C.A. 72-1661, ¶ 16.)

m. Niagara Frontier Hockey Corporation, (hereinafter "Buffalo Sabres"), New York, Buffalo, New York. (Complaint and Answer in C.A. 72-1661, ¶ 17.)

n. Vancouver Hockey Club, Ltd., (hereinafter "Vancouver Canucks"), holds an NHL franchise for a hockey club in Vancouver, British Columbia. (Complaint and Answer in C.A. 72-1661, ¶ 18.)

o. Atlanta Hockey, Inc., (hereinafter "Atlanta Flames"), Georgia, 2 Forsyth Street, N.W., Atlanta, Georgia. (Complaint and Answer in C.A. 72-1661, ¶ 19.)

p. Nassau Sports, a Limited Partnership, (hereinafter "New York Islanders"), New York, 1 Old Country Road, Carle Place, Nassau County, New York. (Complaint and Answer in C.A. 72-1661, ¶ 20.) [14]

10. Clarence S. Campbell, (hereinafter "Campbell"), defendant in C.A. 72-1995 is an individual and President of the NHL and maintains a place of business in Montreal, Quebec, Canada. (Complaint in C.A. 72-1995, ¶ 8.)

11. Jurisdiction of the subject matter duly appears pursuant to 15 U.S.C. §§ 15 and 26 and 28 U.S.C. § 1337 and has not been challenged. Jurisediction and proper venue of the defendants, except Atlanta and Nassau in C.A. 72-1661, is not contested. (*See* Complaint and Answer in C.A. 72-1661, ¶¶ 1 and 21.)

12. C.A. 72-1807 was removed to this Court pursuant to 2 U.S.C. § 1441(a) and (b). (Removal Petition in C.A. 72-1807, ¶ 11.)

13. This matter comes before the Court on motions for partial summary judgment and preliminary injunction submitted by Blazers in No. 72-1661, Centrepoint and Cougars in C.A. 72-1906 and McKenzie in C.A. 72-1807 and 72-1902.

Interstate Trade and Commeece

14. The various teams of the NHL transport players and equipment across state lines and the boundary between Canada and the United States in the course of playing

[14] Atlanta and Nassau were dismissed from C.A. 72-1661 by Order of Court pursuant to an agreement of counsel and they were not named as defendants in C.A. 72-1902. But they remain as named defendants in C.A. 72-1906 and counter-defendants in C.A. 72-1807.

their schedules of professional major league hockey games in the various cities in which NHL teams are located. (Defs.' Proposed Pretrial Order, ¶ 4(c), p. 22.)

15. Each NHL club stages hockey events, contracts with players and other individuals for their services, purchases equipment, contracts with television and radio stations, transports players and equipment, purchases and sells or arranges for the purchase and sale of refreshments at hockey rinks and carries on other activities in various parts of the United States and Canada. (Defs.' Proposed Pretrial Order, ¶ 2, p. 21.)

16. The NHL employs the instrumentalities of interstate commerce in the following respects:

(a) The NHL contracts with national network television stations for the broadcast of certain of its games (Exhibit P-27, Campbell dep., p. 148; Exhibit P-38, Wirtz dep., p. 36: Defs.' Proposed Pretrial Order, ¶ 4(a), p. 22.)

(b) Some of the NHL clubs sell tickets, employ agents and advertise in connection with the staging of some hockey events across state and national boundaries (Defs.' Proposed Pretrial Order, ¶ 4(b), p. 22.)

(c) The staging of hockey events by NHL teams requires interstate travel by them as well as communication in interstate commerce and movement of equipment in interstate commerce. (Defs.' Proposed Pretrial Order, ¶ 4(c), p. 22.)

The Relevant Market

17. The relevant market is major league professional hockey. (Findings of Fact 20-37, *infra.*)

18. The relevant geographic markets are the United States and Canada and the metropolitan areas in which the NHL teams are located. (Findings of Fact 20-37, *infra.*)

19. There is a sufficient disparity between major league professional hockey on the one hand and minor professional league and amateur hockey on the other to distinguish the former from the latter. (Findings of Fact, 20-37), *infra.*

20. The average ticket price for NHL games is $5.22; for AHL games it is $3.07; for WHL games $2.47; and for CHL games $2.42. (Exhibit P-27, Campbell dep., p. 147; Exhibit P-71.)

21. Average paid attendance at NHL games is approximately 14,000; total paid attendance for the 1971-72 season was 7,906,000 for 536 games. The following is the total and average paid attendance for the 1971-72 season at minor league games:

	Total Paid Attendance	Average Paid Attendance	No. of Games
AHL	1,934,504	4,437	436
WHL	1,032,233	4,779	216
CHL	849,333	3,932	216
Total Minor Leagues	3,816,070		

(Exhibit P-71; Exhibit P-27, Campbell dep., pp. 148-149).

22. Total attendance at NHL games was more than twice that of all three minor professional leagues combined, although the minor leagues played more games than the NHL. (Exhibit P-24, Allen dep., p. 225; Exhibit P-27, Campbell dep., pp. 148-49; Exhibit P-71.)

23. The popularity of major league professional hockey vis-a-vis its minor league counterpart is indicated by the fact that average 1969-70 season attendance in the NHL East Division was more than 100% of rated seating capacity. (Exhibit P-59). Chicago Blackhawks President William Wirtz testified that his team's games are typically sold out, but that in contrast the Blackhawks' Dallas minor league team draws only 2,500 in an 8,000 seat arena. (Exhibit P-38, Wirtz dept., p. 42.)

24. The NHL has entered into network television contracts, in both the United States and Canada, the proceeds of which are divided among the NHL member teams. It is, however, highly unusual for a minor league team to be able to secure such an agreement. (Exhibit P-27, Campbell dep., pp. 148, 152.) The Chicago Blackhawks have a local television contract which its out of town games are shown in Chicago. The television station in Chicago pays the Blackhawks for the broadcast rights. No such arrangements can be made for the Dallas minor league team because "(t)here is no market for it". (Exhibit P-38, Wirtz dep. p. 37.)

25. Salaries paid NHL players are far higher than in the AHL. (Exhibit P-24, Allen dep., pp. 221-22.) Contracts offered to younger players often contain two salaries, one if the player is signed by his NHL team, a lesser sum if he is transferred to or remains with a minor league club. (Exhibit P-43; Exhibit P-33, O'Neill dep., pp. 89-91.) The average NHL player's salary in 1971-72 season was $24,000. For minor league players, salaries were typically $11,000 to $12,000. (Exhibit P-24, Allen dep., p. 222.)

26. There is no dispute among the witnesses that the presence of qualified players of major league professional caliber is essential to the successful conduct of major league professional ice hockey competition. (Exhibit D-2, Swados Aff., pp. 3-9; Exhibit P-38, Wirtz dep., pp. 27-28, 44-55; Exhibit P-27, Campbell Test. Senate, p. 545, Exhibit P-28, Cook dep., pp. 74-75.) Robert Swados, Vice President and Counsel of the NHL's Buffalo Sabres, states that highly developed playing skills are essential to the high quality of hockey demanded by major league fans. (Exhibit D-2, Swados Aff., p. 7, ¶ 5.)

27. Most amateur hockey players do not have sufficiently developed skills to warrant their inclusion on NHL team rosters. Such players usually require two to four years of minor professional league seasoning for major league competition. (Exhibit P-38, Wirtz dep., pp. 27-28; Exhibit P-33, O'Neill dep., p. 119.) Swados, of the Buffalo Sabres' organization, observes that only in "rare cases" is an outstanding amateur player placed immediately on the roster of an NHL team. Mr. Swados states:

> "In most cases he would be assigned to a farm club for further development of his skill conditioning, elimination of his weaknesses, refinement of his team play or whatever special training the hockey department of the NHL club felt was required. Upon attaining the necessary skills and experience in team play, he would move up to his major league club." (Swados Aff., p. 12.)

28. The use of young amateur players as the sole basis for a professional hockey league team, in the words of the president of the NHL would mean "they (WHA) have got to spend at least another four years in developing them before they can do them one bit of good" and "if they do, they haven't got a good enough show." (Exhibit P-26, Campbell Senate, p. 545).

29. There are more than 50,000 amateur hockey players in Canada and the United States. In 1972, approximately 7000 Canadian players attained the age of 20 and were available in the NHL draft; of these, 152 were drafted by NHL clubs. By September 25, 1972, 45 of them had been successfully signed by the NHL clubs. (Exhibit D-126, O'Neill dep., p. 105; Exhibit D-2, Swados Affidavit, p. 14). The record does not reveal whether these 45 players immediately will play for an NHL major league team, or will first be assigned to the minor leagues.

30. Any and all of these 50,000 amateur players, including those subject to the NHL draft or actually drafted by an NHL club, but not successfully signed, are available to play in the WHA or any other league. As stated by Mr. Swados, of the NHL, "there is no provision of contract, constitution, by-law or statute that prevents any amateur player, whether or not drafted by an NHL club, from signing with the WHA or any other new league . . ." [Ex. D-2 (Swados), p. 14.] Mr. Davidson, President of the WHA, is also of the view that amateur players are contractually free to sign with any professional team that tenders them a contract. [Ex. D-134 (Davidson), p. 15.]

While there is apparently no legal bar which precludes the WHA's contracting with amateur players of any age, the Canadian government in regulating its sponsored amateur leagues would prefer that the professional leagues draft only amateurs who are over 20 years of age. Even if the WHA observes the 20 year-old rule, there are many "junior hockey graduates", over the age of 20, who have had prior competitive experience by reason of the extensive play in the amateur leagues.

31. The World Hockey Association does intend to utilize some players from the minor professional leagues in order to stock their newly established clubs.

As stated by one of the two promoters of the WHA, the WHA "started off with the premise . . . that we would most probably not get too many players to join us from the National Hockey League after their contract period was up. We started off with that premise, so we looked at the basis that there was the Central League, the Western League, the International League, the Eastern League and the American League, all minor leagues, and the amateur leagues and the European leagues, and we felt that there was a great reservoir of players." [Ex. D-135 (Murphy), pp. 70, 79.] The "Player Personnel Executive" for the WHA, Mr. Steve Arnold (See Ex. D-19) gave Mr. Murphy,

one of the two WHA promoters, "the feeling that there was plenty of good talent to draw from and that there was going to be a considerable reservoir of players to come from in the future." [Ex. D-135 (Murphy), p. 71.]

32. Financial considerations of the WHA further dictate that some players other than those of major league caliber will be signed. The WHA has advised its member clubs that:

> "We would caution each of you that the expenditures for players could far exceed our budgetary estimates unless we all agree to a *firm* formula. This formula will provide for the stocking of each team under the following recommended structure.
>
> "That each team include six graduating Junior Hockey League players, a minimum of six professional players from the Minor Leagues and five other professionals, hopefully National Hockey League players.
>
> "It is felt that we can secure more than enough excellent Junior Hockey League players--future Super Stars—to build a foundation from. It is also felt that these players can be secured at an average cost of $10,000 bonus and a $15,000 salary. It would be to our advantage to sign these players to a multi-year contract." (Exhibit D-115)

33. Bobby Hull, apparently one of the "superstars" in professional hockey, has commented on the ability of junior hockey players:

> "Some buffs consider the brand of hockey played in the Junior 'A' leagues more exciting if not better than that in the NHL. The reasoning is that every player knows he is being watched constantly by the NHL parent club and may be hauled upstairs at any time, if only to fill in for somebody who has been injured. This continued observation is supposed to make the Juniors play better. I doubt they do, regardless of the pressure, and I am certain a fan will see more finesse in the NHL than in the Juniors." (B. Hull, Hockey is My Game, 15-16 (1967)).

Bobby Hull has also stated:

> "I would defy all but the hockey purist to find that much difference between the play in, say, the American Professional League and the NHL. Or for that matter between two of the top Junior 'A' clubs in Canada, though I know I have said there is a difference in play between the NHL and these clubs." (Id. at p. 22)

To the extent there is any inconsistency between the two statements, I adopt the former as a Finding of Fact and specifically reject the latter.

34. The WHA clubs have drafted 104 International Hockey League and Eastern Hockey League players, 105 college players and four known European players. (Exhibit D-3; Exhibit D-135 (Murphy) p. 80-A; Exhibit D-134 (Davidson), p. 16; Exhibit D-87, p. 2; Exhibit D-126 (O'Neill), p. 103.)

The Structure of Professional Hockey and the Supply of Professional Players

35. Prior to the formation of the WHA in 1971, the NHL was the only major league professional hockey association in North America. (Exhibit P-34, Schmidt dep., p. 11; Exhibit P-73; Exhibit P-32, Mulcahy dep., p. 4-114.)

36. In addition to the NHL, there are three other professional hockey leagues in North America. These are the American Hockey League (AHL), the Western Hockey League (WHL), and the Central Hockey League, formerly

the Central Professional Hockey League, (CHL), with a total of 24 teams (Exhibit P-71; Exhibit P-29 at 563-64; Exhibit P-34, Schmidt dep., p. 11; Exhibit P-35, Snider dep., pp. 13-15; Exhibit P-38, Wirtz dep., p. 24.) The best players are found in the NHL (Exhibit P-29, Eagleson Test. in *Flood*, pp. 549-50; Exhibit P-32, Mulcahy dep., pp. 4-114, 4-115), the next best in the American and Western Hockey Leagues, and the lowest level of professional players is in the Central Hockey League (Exhibit P-29, Eagleson, pp. 563-64.)

37. The Internationl and Eastern Hockey Leagues are amateur or at best semi-professional leagues. William Wirtz (NHL) testified that the International Hockey League is an amateur organization "[t]hat does have professional players that have sat out for a couple of years and come back and want their amateur status reinstated." (Exhibit P-38, Wirtz dep., p. 23; Exhibit P-34, Schmidt, dep., p. 11; Exhibit D-2, Swados Aff., p. 12.) And although they are sometimes used by NHL teams for assignment for development of their weakest players (*see* Exhibit P-24, Allen dep., pp. 226-29; Exhibit D-2, Swados Aff., p. 12), their players are generally less talented than those in the minor professional leagues.

38. The NHL requires that each of its member teams must have an affiliation with a "player development team". Exhibit P-33, O'Neill dep. at 28; Exhibit D-2, Swados Affidavit at p. 17). Thus, at least 16 of the 24 professional minor league teams are owned or operated by or affiliated with NHL teams. All of the teams in the CHL are owned by NHL teams. (Exhibit P-25, Campbell *Flood* test. p. 574; Exhibit D-2, Swados Affidavit at 18.) C. S. Campbell stated that in addition to the teams owned by NHL members, " . . . there are almost an unlimited number of affiliations and loaning arrangements of various kinds." (Exhibit P-25, Campbell *Flood* test. p. 574.)

39. The National Hockey League is governed by a Board of Governors and a President selected by that Board, and each individual team defendant herein has a representative and a vote on the Board of Governors. (Exhibit P-3, NHL Constitution, Arts. 5.2, 61.).

40. The NHL By-laws provide that the Board of Governors will adopt a uniform Standard Player's Contract. The contract used during the 1971-72 playing season contained the following provision:

> *Clause 17*
>
> "The Club agrees that it will on or before September 1st . . . next following the season covered by this contract tender to the Players personally or by mail . . . a contract upon the same terms as this contract save as to salary.
>
> The Player hereby undertakes that he will at the request of the Club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement.

(Exhibit P-4, NHL By-Laws, § 2.2(a); Exhibit D-1, Campbell Affidavit, Ex. D-4 attached thereto.)

Any player's Standard Players Contract entered subsequent to March 29, 1972 will contain the following new Clause 17:

> "17. The Club agrees that it will on or before September 1st (August 10th, in the case of protected players and those who played fifty NHL games in the preceding season) next following the season covered by this contract tender to the Player personally or by mail directed to the Player at his address set out below his signature hereto a contract upon the same terms as this contract save as to salary. The Player

hereby undertakes that he will at the request of the Club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement, failing which, by arbitration under the Arbitration Agreement between the League and NHL Players' Association dated March 29th, 1972." Ex. P-1, ¶ 17.

A reserve clause has been in effect since at least 1952. (Exhibit P-38, Wirtz dep. at p. 48)

41. On May 15, 1967, the NHL entered into an agreement with the Canadian Amateur Hockey Association (hereinafter "CAHA") and the Amateur Hockey Association of the United States (hereinafter "AHAUS"). (Exhibit P-8). Prior to this agreement, various NHL member teams had individually sponsored amateur clubs. (Exhibit D-2, Swados Affidavit at p. 15). The Pro-Amateur Agreement also replaced an earlier agreement of September 1, 1958, between the NHL and the CAHA, AHAUS and the International Ice Hockey Federation. (Exhibit P-8, Preamble, p. 2).

42. Unlike professional football and basketball, which can draw on an ample supply of talented players developed in competition at the college level in the United States at no cost to the member clubs of the professional leagues, the NHL has never had such a ready-made source of talent. Accordingly, it has invested millions of dollars to help support a system of amateur league and minor league hockey in Canada and the United States which will give youngsters an opportunity to play hockey and develop their hockey skills and which will thus also provide a source of potential players of major league calibre. (Ex. D-2 (Swados), pp. 7-8; Ex. D-126 (O'Neill), pp. 108-113).

43. During the period June, 1967 through June, 1971 alone, the NHL made grants totaling $5,493,000 to amateur

hockey associations for distribution to and support of amateur hockey leagues throughout Canada and the United States. (Ex. D-2 (Swados), pp. 12-14.)

44. In addition to the NHL's support of amateur hockey, the NHL clubs have invested large sums for the development and support of professional minor league hockey clubs in Canada and the United States, many of which could not continue to operate without the subsidies provided by the NHL clubs. (Ex. D-2 (Swados), pp. 16-20.)

45. The willingness of the NHL clubs to invest so heavily in the development of hockey players in the amateur and minor leagues is based in large part on their belief that if a player developed through this system signs a contract with an NHL club that club will, because of the "reserve" clause, have the right to his services as a professional hockey player. (Ex. D-2 (Swados), pp. 7-9, 16.)

46. On May 1, 1968, NHL and the three minor professional leagues entered into a memorandum of agreement commonly referred to as the Joint Affiliation Agreement or "JAA" (Exhibit P-5 § 1). The JAA recites that its object is the ". . . furtherance of the mutual welfare and interests of the parties hereto and their member clubs in particular . . ." (Exhibit P-5, Preamble.)

47. The Constitution of the NHL gives each team the exclusive control over all professional hockey activities in its "home territory", defined as the city where each team is located and an area of fifty miles from the city limits. (Exhibit P-3, Art. IV).

48. The "home territory" of each NHL team is preserved from minor professional league competition by the Joint Affiliation Agreement [Exhibit P-5, ¶31.] Simultaneously with the execution of the Joint Affiliation Agreement NHL teams acquired from the minor professional leagues territorial rights for Los Angeles, Pittsburgh and San Francisco-Oakland. [Exhibit P-5, ¶ 3, 32.]

49. Clause 17 of the Standard Player's Contracts in the AHL and CHL contain langauge identical in all material respects to that of Clause 17 of the NHL Standard Player's Contract prior to the March 29, 1972 addition of the Arbitration clause. [Exhibits P-6; P-7, P-42.]

Clause 17 of the Standard Player's Contract of the WHL is identical to the above, except that instead of stating "the club agrees . . .", it states "The Club shall have the option. . . ."

The similarities of phraseology and basic incorporation of Clause 17 in the Standard Player's Contract of the AHL, CHL, WHL, and NHL is the result of a common agreement, mutual understanding, and conspiracy by the NHL and its affiliated minor leagues to maintain a monopolistic position so strong that the NHL precludes effective competition by the entry of another major professional hockey league. Through the totality of many interlocking arrangements, including the Joint Affiliation Agreement, the Pro-Amateur Agreement, and Clause 17 in the Standard Player's Contract, the NHL perpetuates a conspiracy and combination with the intent to monopolize and which monopolizes major league professional hockey. These concerted efforts were done not solely to maintain a high level of professional competition among the NHL teams, but rather the major reason was the desire to preclude others from ever having imediate access to the reservoir of players who could become part of another major professional hockey league which could be a material and viable competitor to the NHL. In the words of Mr. Clarence Campbell, President of the NHL, part of the NHL's purpose was to make certain that the NHL would always be ". . . the only major professional hockey league operating from coast-to-coast in the United States or Canada." [Exhibit P-73.]

THE NATIONAL HOCKEY LEAGUE BY-LAWS

50. Paragraph 18 of the Standard Player's Contract, provides that the player and the club are ". . . to be legally bound by the Constitution and By-Laws of the league." [Exhibit P-1, ¶ 18].

51. The By-Laws provide that no member club may derogate from or change the provisions of the Standard Player's Contract without authorization of the Board of Governors. [Exhibit P-4, § 2.2(a)].

52. The By-Laws [Exhibit P-4, § 4] also establish "lists" relating to the right of NHL teams to control the services of professional players and provide the number of players which each team may maintain on such lists:

List	*Number of Prayers*
a. Reserve List	30 [Exhibit P-4, § 5]
b. Goal Keepers Reserve List	3 [Exhibit P-4, § 6]
c. Negotiation list	4 [Exhibit P-4, § 7.1]
d. Voluntarily Retired List	
e. Playoff Eligibility List	
f. Sponsorship List (now obsolete)	
g. Protected List	20 [Exhibit P-4, § 16A.1]
h. Inactive List	

53. Pursuant to the By-Laws, the Joint Affiliation Agreement with the minor leagues and the Pro-Amateur Agreement, a Central Registry is maintained by the NHL, which receives and records all of the documents relating to the rights of NHL and minor league teams to various players and the transfer of amateur draft rights [Exhibit P-4, § 9.9; Exhibit P-5, 13; Exhibit § 13; Exhibit P-8, § 14.]

54. Section 15 of the By-Laws forbids "tampering" with any player owned by any other club. "Tampering" as used in section 15 includes negotiating with, offering employment or discussing employment. It includes also the making of any public or private statement indicating a desire, interest or intention of acquiring the services of a player. Punishment for violation of this By-Law may include a fine of not less than $2,000 but not more than $10,000 of which 50% is received by the offended club, prohibition of employment of the "tampered" person, and deferment by the offending member club of its choice in the draft proceedings. [Exhibit P-4, § 15]. Similarly, no member club may directly or indirectly negotiate with a player on another team's negotiation list. [Exhibit P-4, § 7.2].

55. Paragraph 14 of the By-Laws provides that each NHL team shall be liable for any act or omission of a minor league team owned, operated or affiliated by it which violates the By-Laws. The President of the NHL has the sole discretion to determine ownership, operation or affiliation. [Exhibit P-4, § 14.3].

56. The By-Laws, the Joint Affiliation Agreement and the Pro-Amateur Agreement establish the procedures for drafting players. [Exhibit P-4, §§ 16, 16A; Exhibit P-5, §§ 19, 22, 23.] There are four types of drafts:

a. The Inter-League draft, between the NHL and the three minor professional leagues;

b. The Intra-League draft, among NHL teams *inter se;*

c. The "reverse" draft, by which players move from the NHL back to the minor leagues,

d. The universal amateur draft.

57. The Inter-League draft is controlled by Section 16 of the By-Laws [Exhibit P-4, § 16], and the Joint Affiliation Agreement [Exhibit P-5, § 19]. Players selected in the

Inter-League draft are placed on the reserve list of the selecting NHL club. [Exhibit P-4, § 16.6). Not more than three hours following the Inter-League draft, each NHL team submits to the President a list of 18 players and two goal keepers it wishes to "protect". The "protected" lists are then circulated among the NHL member clubs as an offer to sell for $40,000 any "unprotected" professional or amateur player over the age of 22, on the club's reserve list (other than a first year professional). [Exhibit P-4, § 16.3A]

58. The Universal Amateur Draft is conducted pursuant to By-Law 16B and the Pro-Amateur Agreement. The By-Laws provide that "no player shall be exempt from such right of selection in the year in which he is eligible for claim." [Exhibit P-4, § 16B.2(b)]. Conversely, the Joint Affiliation Agreement prohibits any professional team from dealing with a player before he has passed through the Universal Amateur Draft. [Exhibit P-5, § 15(c)]. Selected players are placed on the selecting club's reserve list as "unsigned draft choice", which gives the selecting club the exclusive right to negotiate with such players. [Exhibit P-4, § 16B.-5(a)]. The selecting player may be held on the selecting clubs' reserve list so long as that club offers his employment in the NHL for a minimum of $10,000 per year or in the minor league for a minimum of $5,000 per year. [Exhibit P-4, § 16B.5(b)].

59. Payment to the amateur associations for selected players is set out in the By-Laws [Exhibit P-4, § 16B.6] and Pro-Amateur Agreement [Exhibit P-8, ¶ 18] as follows:

a. $3,000 for each player selected in the Universal Amateur draft.

b. An additional $3,000 if such player is signed by an NHL team.

c. $4,000 if in his first year under a Standard Player's Contract, such player plays in 25 or more NHL games.

Recently, these amounts have been amended [Exhibit D-2, Swados Affidavit, at p. 13]

60. Any player under contract or reserved by a member who, without permission, plays for any other league or organization may be expelled or suspended as may a player refusing to sign a standard player contract containing an arbitrator's award. [Exhibit P-4, § 17.5] The President of the league may prohibit the employment of any person by any member club if in his opinion such employment would be "prejudicial to or against the welfare of the league". [Exhibit P-4, § 18].

61. In addition to establishing the waiver price ($40,000) for NHL players and minimum salary levels for drafted amateurs ($10,000 in NHL, $5,000 in the minors), the By-Laws provide that no member shall pay or offer to pay its players any bonus or other reward which would be a special inducement over and above the contracted salary [Exhibit P-4, §§ 16A.7, 16B.5(b), 25.3; Exhibit P-38, Wirtz dep. p. 15].

THE PRO-AMATEUR AGREEMENT

62. The Pro-Amateur Agreement recites that the NHL is contracting on behalf of its associated and affiliated minor professional leagues, and the Joint Affiliation Agreement confirms that authority. [Exhibits P-8, p. 1; P-5, ¶ 28].

63. The NHL agrees to recognize the CAHA and AHAUS (hereafter "amateur associations") as the "sole and exclusive governing bodies of amateur hockey within their respective territorial and constitutional spheres . . ." and agrees that ". . . in all matters relating to amateur hockey and its relations with professional hockey . . ." the NHL will deal only with the amateur associations. The NHL also agrees to notify the amateur associations if it becomes aware of the possibility that a professional hockey club might be entering an amateur association's territory, and if any amateur group seeks recognition as a professional league, application for such change in status would be first submitted to the amateur associations. [Exhibit P-8, ¶ 2].

64. The amateur associations acknowledge that the NHL and its affiliated and associated minor leagues ". . . are the sole and exclusive governing bodies of professional hockey in Canada and the United States of America . . ." and agree that ". . . in all matters relating to professional hockey and its relations to amateur hockey . . ." the amateur associations will deal only with the NHL. [Exhibit P-8, ¶ 3].

65. The amateur associations and the professional leagues agree to recognize each other's suspensions in a manner similar to the reciprocal recognition of suspensions contained in paragraph 26 of the Joint Affiliation Agreement. The effect of these agreements is to preclude a suspended player from any participation in organized professional or amateur hockey. [Exhibits P-8, ¶¶ 4, 5; P-5, § 26].

66. The amateur associations also acknowledge that the Standard Player's Contract, the negotiation claim and the unsigned draft claim will be the ". . . only officially recognized relationships in existence and use . . ." by the NHL and minor professional leagues [Exhibit P-8, ¶ 6], and that a player will be considered a "professional" only when he has signed a Standard Player's Contract [Exhibit P-8, ¶ 9]. The recognition of the Standard Player's Contract, the negotiation nomination and unsigned draft claims are supplemented with the recognition by the amateur associations of the various lists employed by the four professional leagues. [Exhibit P-8, ¶ 17].

67. The NHL, CAHA, and AHAUS agree that ordinarily no amateur player may be a "professional" unless he has reached his 20th birthday by December 31-January 1 of that season. [Exhibit P-8, ¶¶ 10, 11].

68. The NHL and the amateur associations agree to establish a Joint Development Committee to oversee liaison between the groups and that the NHL will subsidize the

amateur associations, and make certain payments also specified in the NHL By-Laws [Exhibit P-8, ¶¶ 17, 18] for players drafted in the Universal Amateur Draft.

69. The Pro-Amateur Agreement also recites procedures by which a professional player seeking to be reinstated as an amateur must obtain permission of either the club with whom he was affiliated or the Joint Development Committee. [Exhibit P-8, ¶ 16].

70. The parties agree that they and their respective clubs will not "tamper" with each other's players. [Exhibit P-8, ¶ 16; *see,* Finding 54, *supra.*]

THE JOINT AFFILIATION AGREEMENT

71. The NHL Constitution and By-Laws are subject to § 29(a) of the Joint Affiliation Agreement:

> "(a) Each league, party to this agreement, is free to adopt such Constitution and By-Laws and League Rules or Regulations as it may see fit, provided always that nothing in such Constitution, By-Laws, Regulations or Rules shall conflict with this agreement while it is in force."

72. Under the Joint Affiliation Agreement each NHL member is permitted to protect 37 players, including players under Standard Player Contracts, not more than three goalies, and four negotiation nominees or unsigned draft choices. AHL and WHL clubs are entitled to protect thirty-one players. CHL clubs are entitled to protect thirty players. [Exhibit P-5, § 2].

73. Protection is recognized by the four professional leagues only if the player in question is under a Standard Player Contract. [Exhibit P-5, § 3]. Paragraph 3 of the Joint Affiliation Agreement specifies the Standard Player's Contract and registration of draft claims and negotiation nomination and states: "No other forms of agreement will be recognized or acted upon for the purpose of registering

the rights to the services of any player upon the reserve list of any club." [Exhibit P-5, §§ 3, 12e].

74. Section 12(d) of the Joint Affiliation Agreement provides:

> "Every professional player must sign a Standard Player's Contract in the form recognized by the league in which he plays, which contract shall be filed with the Central Registry Bulletin. Such contract shall not be modified by any deletion therefrom or by the addition of any provision thereto which has the effect of derogating from the printed contract in any manner whatsoever."

75. Under Section 5(a) and (b) each league agrees to "acknowledge and respect" the negotiation nominees or negotiation claims of the member teams in each league to a maximum of 4 such nominations for NHL clubs, three for AHL and WHL clubs and two for CHL clubs. The parties also agree that "a player whose name has been validly placed on any of the club or league lists hereinbefore described shall not be placed on any list of any other club in any league." [Exhibit P-5, §§ 5(a) and (b), 8(a)].

76. The Joint Affiliation Agreement recognizes and refers to the Pro-Amateur Agreement, provides that the age limit for competition in the junior category of amateur competition in the CAHA and AHAUS shall be 20 years [Exhibit P-5, § 15(a)], and establishes interleague rules governing the conduct of the Universal Amateur Draft. [Exhibit P-5, §§ 15(b), 22]. Similarly, the Joint Affiliation Agreement also establishes the procedures for the Inter League draft, one of the methods by which players are transferred from the minor professional leagues to the NHL [Exhibit P-5, § 19, See Exhibit P-33, O'Neill Dep. at 29], and the "reverse draft" by which the minor leagues may draft players from NHL teams. [Exhibit P-5, § 23]. Section 20 provides that "[a] draft claim shall be considered as an actual pur-

chase of the player drafted and subject to the normal rules governing purchases." Conversely, Section 23 provides that, by selecting a NHL player, the selecting minor league in the reverse draft becomes the owner of the right to the services of the player claimed. [Exhibit P-5, §§ 20, 23(i)].

Clause 17 of the National Hockey League Standard Player's Contract

77. Since at least 1958 the NHL Standard Player's Contract has contained the following language:

> "The player hereby undertakes that he will at the request of the club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement . . ." [Exhibit D-1, Affidavit of Clarence Campbell, especially Exhibits D-1 through D-5 attached thereto.]

78. In 1969 certain provisions of the NHL Standard Player's Contract came under severe criticism from Task Force on Sports for Canadians, including the reserve clause which is described as giving the Club the "right to require [a player under contract] to give his services indefinitely and wholeheartedly to the Club." The Report concludes:

> "The Task Force cannot approve of this reserve clause. We recommend that steps be taken, if necessary by legislation, to require its deletion." [Exhibit P-68 at 35.]

79. R. Alan Eagleson, Executive Director of the NHL Players' Association, testified in 1970 in Flood v. Kuhn that:

> "[The reserve clause] is considered by me, and I am sure by most, to be simply a lifetime option clause and that a player once he signs the contract, since that is

> the standard contract of the league, signs with a team for life." [Exhibit P-29, Eagleson *Flood* at p. 550.]

80. On June 28, 1972, Mr. Eagleson testified before the Senate Commerce Committee that the nature of the reserve clause had not changed in the intervening two years. He stated:

> "There is no way that the players in the National Hockey League can accept the position [the reserve clause] under the present circumstances, namely, *lifetime option* on a player's services." [Exhibit P-30, Eagleson Senate at p. 507 (Emphasis added).]

81. Charles W. Mulcahy, Jr., General Counsel and Vice-President of the Boston Bruins, on September 30, 1972, agreed that the reserve clause is a perpetual option. [Exhibit P-32, Mulcahy dep. at p. 2-173, p. 3-38.] In addition, William Wirtz, President of the Chicago Blackhawks, concurs in the view that the reserve clause constitutes a "continual option clause". [Exhibit P-38, Wirtz dep. at p. 49.]

82. In his 1969-1970 Report to the NHL Board of Governors, President Campbell expressed opposition to any attempt to "water down" the reserve clause and urged the Governors to use the League's position to maintain the provision. [P-59 at pp. 7-8.]

83. Clause 17 of the Standard Player's Contract, Amended Form, June, 1970—the contract used for the 1971-72 season, made no reference to any method for resolving disputes as to salary except by mutual agreement between the parties. [Exhibit D-1, Campbell Affidavit, Exhibit D-4, Cl. 17.]

84. On August 20, 1971, pursuant to a directive of the NHL Owner-Player Council, R. Alan Eagleson and Clarence Campbell initially entered into an arbitration agreement for the resolution of salary disputes for the 1971-72

season naming Edward J. Houston as Arbitrator. [Exhibit D-1, Campbell Affidavit at ¶ 9.]

85. The August 20, 1971 arbitration agreement reflected a change in the means or the manner in which salary was to be determined, and it is clear that the parties did not intend the entire standard player's contract to expire at the conclusion of 1972 because there was no agreement as to arbitration in the contract. [Based on Findings 79-81, 83, 84, 89.]

86. On March 29, 1972, an agreement was reached between the NHL Players' Association and the NHL that salary disputes would be submitted to a neutral arbitrator pursuant to an arbitration agreement signed by R. Alan Eagleson on behalf of the NHLPA and Clarence Campbell on behalf of the NHL. This agreement by its terms expires at the end of three years. [Exhibits P-52 and D-1, Campbell Affidavit at ¶ 10, Exhibit C.] The only purpose of the arbitration agreement was to provide a means for resolving salary disputes for the option years of the Standard Player's Contract. [Exhibit D-1, Campbell Affidavit at ¶ 10.]

87. This arbitration agreement was neither intended nor understood by the parties to it to alter in any way the perpetual nature of the reserve clause. Mr. Eagleson's testimony referred to above before the Senate Commerce Committee and the testimony of Messrs. Mulcahy and Wirtz in their depositions, all were given from three to six months after the March 29, 1972 arbitration agreement was executed. As found above, the testimony of both the owners and the players indicates that, notwithstanding any time limitation in the arbitration agreement, the reserve clause of the Standard Players' Contract continues to be understood as a perpetual option on the players' services without limitation. [Based in part on Findings 79, 80, 81.]

88. Section 2.2 of the By-Laws of the NHL provides in pertinent part:

> "The provisions [of the Standard Player's Contract] shall not be changed or derogated from except as may be authorized by resolution of the Governors."

There is no evidence of record to indicate that the arbitration agreement dated March 29, 1972, and alleged to be part of the Standard Player's Contract, has ever been approved by the Board of Governors. [Exhibit P-4, § 2.2.]

89. The record does not indicate that any players who have signed with WHA teams signed an amended March 1972 Standard Player's Contract. Therefore, the court finds that none of the Standard Player's Contracts here in dispute—those between NHL teams and players who have signed with WHA teams for the 1972-73 season—contain a reference to the Arbitration Agreement of March 29, 1972 between NHL member clubs and professional players [Exhibit D-1, Campbell Affidavit, Exhibit C.].

Paragraph 17 of the NHL's Standing Player's Contract and Collective Bargaining

90. Since 1967, the NHL has recognized the NHL Players' Association as the representative of all the NHL players for purposes of collective bargaining with the players' employers, the various clubs that comprise the NHL, who in turn bargain jointly with the Association. [Exhibit D-1 (Campbell), § 6, and attached Exhibit A, p. 3; Exhibit D-2 (Swados), ¶ 9, p. 23, ¶ 10.] During the 1971-72 NHL playing season, every NHL player was a dues-paying member of the Players' Association. This latter accomplishment was undoubtedly facilitated by a "check-off" arrangement adopted in 1969 by the Players' Association. [Exhibit D-1 (Campbell), ¶¶ 7, 15, attached Exhibit A, p. 4 and attached Exhibit F (Eagleson, pp. 480-81; Exhibit D-2 (Swados), ¶ 10, p. 25.]

91. Bargaining between the NHL Players' Association (NHLPA) and the NHL clubs is carried on principally

through the medium of an Owner-Player Council, which meets regularly. Ex. D-1 (Campbell), ¶¶ 5-10, 15, and attached ex. A, ex. F (Eagleson), p. 481; Ex. D-128 (Mulcahy), p. 26; Ex. D-129 (Wirtz), p. 65. The Owner-Player Council has incorporated into a cumulative book of "Minutes and Agreements" those agreements reached by the Council that were in effect as of January 1, 1972. Ex. D-1 (Campbell), ¶ 6, and attached ex. A.

92. During 1969, 1971 and 1972, the NHL clubs and the NHLPA entered into agreements relating to the arbitration of salary disputes under paragraph 17. The 1971 agreement is the "Agreement Establishing the 'Terms of Reference for the Arbitration of Salary Differences between NHL Member Clubs and Professional Players for the Season 1971-72' " agreed to by the NHL clubs and the NHLPA on June 10, 1971, and signed by the executive director of the Players' Association and the president of the NHL on August 20, 1971, and the 1972 agreement is the "Agreement Establishing the 'Terms of Reference for the Arbitration of Salary Differences between NHL Member Clubs and Professional Players for the Seasons 1972-73, 1973-74 and 1974-75,' " similarly agreed to and signed on March 29, 1972 (hereafter sometimes referred to as the "1971 Arbitration Agrement" and the "1972 Arbitration Agreement" respectively). Ex. D-1 (Campbell) ¶¶ 9-10, and attached exs. B, C. The NHL clubs and the NHLPA have acknowledged that these agreements constitute, during their operative periods, part of the overall set of agreements existing between and binding upon them. [Ex. D-1 (Campbell), ¶¶ 9-10; Ex. D-1 (Campbell), ¶ 6, and attached ex. A, p. 7; Ex. D-1 (Campbell), ¶ 15, and attached ex. F (Eagleson), pp. 485-86; Ex. D-2 (Swados), ¶ 10, p. 26, item 8.]

93. Paragraph 17 of the NHL Standard Player's Contract directly involves terms and conditions of employment and is one of the subjects about which the clubs and the

Players' Association have discussed since 1967. [Findings of Fact 94-103].

94. As early as June 1969 the Players' Association and the NHL clubs agreed, following negotiations between them, that disputes over what salary should be paid to a player under paragraph 17 should be determined by binding, third-party arbitration. The agreement reached by the NHL clubs and the NHLPA at that time provided that each party to such a dispute was to select one arbitrator, with the two arbitrators thus chosen deciding the salary question jointly, and that in the event that these two arbitrators were unable to reach a decision, they were to select a third arbitrator who would then decide the issue. Ex. D-1 (Campbell) ¶ 8; Ex. D-2 (Swados), ¶ 10, app. A. Previously, disputes regarding salary under paragraph 17 had been determined by the president of the NHL, as reflected in the version of the Standard Player's Contract then in effect. [Exhibit D-1 (Campbell), ¶¶ 8, 12, and attached Exhibit D-3, ¶ 17.]

95. This system of arbitration continued in operation for the next two years. At the time of the NHL Board of Governors' meeting of June 8-9, 1971, however, the Owner-Player Council considered the question further and agreed on June 10 of that year to institute a new system on a trial basis for a period of one year. Under that system, salary arbitration decisions under paragraph 17 were to be made by a single independent arbitrator to be chosen jointly by the president of the NHL and the executive director of the Players' Association; and Edward J. Houston, Q. C., was in fact chosen by them to serve as arbitrator. [Ex. D-1 (Campbell, ¶¶ 6, 9, ex. A, p. 7, ex. B; Ex. D-121 (Campbell), pp. 154-55; Ex. P-39, item 18, p. 4.]

96. Further negotiations between the Players' Association and the NHL clubs resulted, on March 29, 1972, in an agreement between those parties extending the 1971 Arbitration Agreement, with certain modifications, for another

three years. Under this 1972 Arbitration Agreement, Mr. Houston remains as arbitrator for the next three playing seasons, and a procedure is set out for selecting a successor in case of his inability to so act during the specified three-year period. Ex, D-1 (Campbell), ¶ 10, and attached ex. C; Ex. D-2 (Swados), ¶ 10, item 8; Ex. D-129 (Wirtz), pp. 67, 68; Ex. P-39, item 21, p. 5. The NHL Board of Governors, having failed to ratify the 1972 Arbitration Agreement, could assert that the 1972 Arbitration Agreement is not enforceable.

97. The NHLPA and the NHL acknowledge that the Arbitration Agreement, like all Owner-Player agreements, automatically modifies and supersedes any conflicting provisions in *subsequently* signed NHL player contracts and automatically becomes a part of such contracts. Ex. D-1 (Campbell), ¶¶ 10, 15, and attached ex. F (Eagleson), p. 481; Ex. D-127 (Eagleson), pp. 547-8; Ex. D-122 (Cooke), pp. 53-54, 56; Ex. D-123 (Snider), Vl. 2, pp. 78-79, 82; Ex. D-125 (Mulcahy), Vol. 4, pp. 33-35; (for a discussion of the effect on contracts then in existence, see pages 505-10, *infra*). The form of the NHL Standard Player's Contract promulgated by the League in June 1972 incorporates this agreement by explicit reference in paragraph 17. [Ex. D-1 (Campbell), ¶ 11; Ex. P-1, ¶ 17.]

98. In the summer of 1969, the NHL Board of Governors approved the use of binding third-party arbitration to settle salary disputes under paragraph 17 (Ex. D-1 (Campbell), ¶ 6, and attached ex. A, pp. 7-8; Ex. D-2 (Swados), ¶ 10, and attached app. A, p. 1; Ex. P-39, item 6, p. 2); and the 1971 and 1972 Arbitration Agreements state they are based on authorization by both the Players' Association and the NHL. [Ex. D-1 (Campbell) ¶ 9, and attached ex. B, p. 4; Ex. D-1 (Campbell), ¶ 10, and attached ex. C, p. 4; Ex. D-121 (Campbell), pp. 153-55]. At the October 25-27, 1971 semi-annual meeting of the Board of Governors, the Board unanimously approved and ratified a change

in the NHL Standard Player's Contract to incorporate the provision for binding arbitration of salary disputes under paragraph 17 already agreed upon through collective bargaining. [Ex. P-39, item 19, p. 5.]

99. Assuming that the 1972 Arbitration Agreement will be ratified by the Board of Governors, the legal status of the contractual obligations of the players upon the expiration of the 1972 Arbitration Agreement at the end of the 1974-75 playing season is unclear. This legal issue is further clouded because, as was done in 1971 and 1972, the Players' Association and the NHL can agree to extend the arbitration arrangements previously entered into. Some NHL officials assert that upon the expiration of the 1972 Arbitration Agreement at the end of the 1974-75 playing season there will exist no provision in the NHL Standard Player's Contract for the determination of salary under paragraph 17. Therefore, they contend there would at that point be no binding contractual obligation upon any player, under paragraph 17, to sign a new contract for the 1975-76 playing season. This conclusion, while a conclusion of law (Ex. D-128 (Mulcahy), pp. 32-33), is expressed in the deposition testimony of Mr. Jack Kent Cooke, president of the NHL California Sports, Incorporated, taken on September 14, 1972, and Mr. Edward Snider, chairman of the Board of the NHL Philadelphia Hockey Club, Inc., taken on September 25, 1972. As the testimony appearing below indicates, Cooke recognized the possibility of an extension of the Arbitration Agreement and qualified his answer to allow for that contingency. [Ex. D-1 (Campbell), ¶ 15; Ex. D-122 (Cooke), pp. 58, 69; Ex. D-123 (Snider), Vol. 2, pp 78-79].

100. On September 14, 1972, Mr. Jack Kent Cooke, President of the NHL California Sports, Incorporated, and a member of the Board of Governors of the NHL, was asked in a deposition by Mr. Stabile, WHA counsel, whether, assuming that a player contract was entered into for an

express term of one year, it would "be the position of California Sports that in those circumstances the term of the Standard Player's Contract is three years" by virtue of the operation of the 1972 Arbitration Agreement. His answer was that "[i]t would, at this moment, *subject to an extension of the current arbitration agreement and collective bargaining agreement.*" Ex. D-122, p. 58 (emphasis added).

101. Similarly, Mr. Edward Snider, Chairman of the Board of the NHL Philadelphia Hockey Club, Inc., testified in his deposition on September 25, 1972, that "[t]he agreement we have with the Players Association include[s] many, many things of which an arbitration agreement is one and the arbitration agreement is for three years which is an amendment to or whatever you might call it to the player's contract that in essence in my view gives [us] the rights to our players for three years." [Ex. D-123, pp. 78-79.]

102. Mr. Alan Eagleson, executive director of the Players' Association, testified before the Senate Commerce Committee in June 1972 that "[e]very contract is signed for three years. It is for three years." [Ex. D-1 (Campbell), ¶ 15, and attached ex. F. p. 488.] His testimony, however, provides no substantiation as to whether all of the players' contracts are of three years' duration or that they all cover the time span of the March 29, 1972 Arbitration Agreement. In fact, some players have had contracts of less than three years. [Ex. P-77, ¶ 6.]

103. The negotiations with respect to *arbitration* outlined above have been bona fide, good-faith collective bargaining negotiations relating to genuine issues of employer-employee relations, and the currently existing 1972 Arbitration Agreement is a product of such negotiations. This finding does *not* mean that there has been bona fide, good-faith collection bargaining with respect to the "reserve" clause. [Findings 90-102, *supra*.]

104. In addition to the above negotiations with respect to salary arbitration under paragraph 17, "discussions" between the parties relating to that paragraph have taken place on several occasions. [Ex. D-59, item 1; Ex. D-60; Ex. D-61; Ex. D-62; Ex. D-63; Ex. D-128 (Mulcahy), pp. 26-29); Ex. D-129 (Wirtz), pp. 60, 65-68.]

105. Other than the self-serving statement of certain NHL representatives that the reserve clause has been maintained in its traditional form as a trade-off for certain benefits to the players, the record is devoid of any evidence implying much less demonstrating that the reserve clause has been retained as the result of serious, good-faith collective bargaining.

106. Although the issue of the reserve clause has been discussed often, neither party has ever modified its position. The owners have been insistent on the continuation of the reserve clause basically in its present form, and the players have, since the formation of the Players' Council, been consistently against this type of reserve clause. As an example, on May 26, 1969, Mr. Alan Eagleson, Executive Director of the NHLPA, made as his first request that "the standard NHL contract be amended so that a player has the right to play out his option in a manner similar to that which exists in professional football in Canada and in the U.S.A." [Exhibit D-59].

At a later joint press conference on June 11, 1969, Mr. Alan Eagleson, executive director of the Players' Association, and Mr. Charles Mulcahy, negotiator for the NHL clubs in the Owner-Player Council, stated specifically that the "matter of the reserve clause was discussed" in the Council and that the parties "will continue to discuss" the issue. [Ex. D-2 (Swados), ¶ 10, and attached app. A. p. 1.]

It should be noted that while apparently the "reserve" clause was discussed, there was never any modification of the provision. In 1969, the Players' Association signed an

agreement, independent of the discussions concerning the "reserve" clause, which granted the players improvements in the pension fund system.

The minutes of the Player-Owner Council show that "a committee composed of Messrs. Berenson, Ullman, Eagleson, Putnam, Wirtz, and Mulcahy has been formed to make a joint review of this matter [the reserve clause] upon the express understanding that the formation of said Committee does not necessarily imply that either the Owners or the Players will change their position in this regard. The first of these meetings was held on August 20th, [1969]." Despite continuing discussions from that date to the present, the reserve clause has not been modified. [Ex. D-62].

107. Additional discussions regarding paragraph 17 have taken place at various times and are continuing with no change of position by either party, as indicated by a press release issued jointly on August 30, 1972, by Mr. Eagleson and Mr. Clarence Campbell, president of the NHL. That press release states with respect to an August, 1972 meeting of the Owner-Player Council (Ex. D-125 (Mulcahy), vol. 3, p. 37), that "[s]ection 17 of the NHL contract was discussed again. Meetings took place on the reserve clause in early 1972 and this matter was raised again." [Ex. D-2 (Swados), ¶ 10, and ex. A, p. 3].

108. I find that the testimony of both R. Alan Eagleson and Charles W. Mulcahy, Jr., NHL owner representative of the Owner-Player Council, are credible and that they establish that the reserve clause has never been the subject of bona fide, good-faith collective bargaining. [Findings 109-110, *infra.*]

109. On June 22, 1972, Mr. Eagleson wrote to Mr. Mulcahy and made the following observations:

> "Although I distinguish between hockey and baseball in that the latter enjoys antitrust exemption, I noted

> with interest one of the comments of a dissenting judge. *He suggested that the reserve clause should be the subject of collective bargaining.*
>
> *As you know, we have skirted this issue for some time now.* Would you agree that this matter should be a topic for discussion at our next Player-Owner Council Meeting?" [Exhibit P-55 (emphasis added).]

110. Mr. Mulcahy in his deposition taken on October 2, 1972, when asked to describe the nature of the discussions in the Player-Owner Council concerning the reserve clause responded as follows:

> "The proposals were made, I believe by both sides, sir.
>
> Let me put it then this way: I don't know that they were actually proposals. Proposals is the wrong word. There were—There was an examination by both sides of various avenues that could—that were possibilities of solving it. No one said, 'This is our proposal, if you would accept this, we would do this.' *They never got to that stage.*
>
> It was an examination of what other sports had done, whether they would be applicable, could be used by hockey, and also some that have never been used by other sports, I believe." (emphasis added) [Exhibit P-31, Mulcahy dep. at p. 30].

111. The Court, therefore, finds that the reserve clause, as it now exists has been discussed; the owners have never been willing to modify it except as to the arbitration of salary. There is no indication that for any of the benefits offered the players that the owners would have been willing to modify the reserve clause in lieu of the other benefits given. Thus in that context there does not appear to have been any "collective bargaining" on the reserve

clause except as to arbitration of salary. Further, the arbitration of salary did not in any respect modify the perpetual nature of the reserve clause.

112. Paragraph 13(c) of the 1970 version of the Standard Player's Contract was eliminated from the Standard Contract as a result of collective bargaining. [Ex. D-2 (Swados), ¶ 10, items 7, 13.] Inasmuch as persons knowledgeable with respect to NHL affairs could not recall an instance in which paragraph 13(c) had been invoked (Ex. P-51, p. 1), and, indeed, since the provision would not have permitted decisions to "cut" a player to be made arbitrarily, the impetus for this change came solely from certain of the NHL clubs, along with the subsequent support of the Players' Association. [Ex. D-1 (Campbell), ¶ 15, ex. F. (Eagleson), pp. 481-84, especially p. 484)]. Complete deletion of paragraph 13(c) with respect to the contracts of all clubs was not possible until the issue was negotiated and agreed upon by the Owner-Player Council. [Ex. D-137 (Swados), pp. 8-9]. This change had the effect of removing the only exception to the club's honoring its obligation under paragraph 17 to tender to the player a contract for the year following the original period covered by the prior contract. [Ex. D-1 (Campbell), ¶¶ 13-14; Ex. D-2 (Swados), ¶ 10, app. A, p. 3.]

THE NECESSITY FOR SOME FORM OF RESERVE CLAUSE

113. Every major professional team sport utilizes some form of "reserve" clause in its standard player's contract. [Exhibit D-1 (Campbell), attached Exhibits E-1 through E-4.] Some of the purported justifications for a "reserve" clause (*e. g.*, the need for competitive balance within the league) apply to all sports. A less anti-competitive "reserve" clause than the present one may be needed in hockey.

114. In order to be successful, a professional hockey league normally must have some of the qualities of parity among its member teams which make other sports successful. That is, the public must believe that there is relative parity among the member teams and that each team has the opportunity of becoming a contender over a reasonable cycle of years and a reasonable chance of beating any other team on any given night. [Exhibit D-134 (Davidson), pp. 17-21; Exhibit D-135 (Murphy), pp. 92-96; Exhibit D-8, p. 23; Exhibit D-1 (Swados), pp. 29, 37; Exhibit P-27 (Campbell, supplemental designation), p. 93; Exhibit D-121 (Campbell), p. 220.]

115. The history of the NHL's Stanley Cup Series, the "World Series" of hockey, indicates that relative parity does not exist within the NHL. In the last twenty years, Montreal has won the Stanley Cup on twelve occasions, Toronto has won four times, Detroit has won three times, and Chicago has won once. [Exhibit D.]

116. The founders of the WHA believe that even if the quality of the hockey played by its member teams is not as high as in the NHL, the WHA will still be successful if it can maintain sufficient parity of quality among its own teams. [Exhibit D-135 (Murphy), pp. 92-93.]

EXPANSION

117. The NHL was organized in 1917. By 1942, the League consisted of six teams. In 1967, six new teams were added. In 1970, the NHL expanded to fourteen teams. [Exhibit D-2 (Swados), pp. 21-24.]

118. In 1971, the NHL authorized franchises for Nassau County, New York, and Atlanta, Georgia, for additional expansion to 16 clubs for the 1972-73 season. [Exhibit P-58.]

119. Since 1966, the NHL has received in excess of 36 million dollars for the sale of the rights to play major league professional hockey. [Exhibit D-2, Swados Affidavit at 36; Exhibit P-38, Wirtz Deposition at pp. 12-15.]

120. In 1967, the NHL, then a six-team organization, permitted six additional teams to be formed, charging $2,000,000 to each new team for the privilege of joining the league. That $2,000,000 from each new entrant was distributed among the original six teams. [Exhibit P-38, Wirtz Deposition at p. 26; Exhibit D-2, Swados Affidavit at pp. 36-37.]

121. Since 1967, the question of additional expansion has been the subject of constant discussion in the NHL [Exhibit D-121 (Campbell), p. 218; Exhibit P-35 (Snider), pp. 34-36; Exhibit D-123 (Snider), pp. 67-68.] At the time of the 1970 expansion, the NHL indicated that additional expansion was anticipated. [Exhibit D-2 (Swados), p. 24; Exhibit P-35 (Snider), pp. 34-36; Exhibit D-123 (Snider), p. 68.]

122. In 1965, Clarence Campbell announced that the intention of the league was that expansion would make the NHL ". . . the *only* major professional hockey league operating from coast-to-coast in the United States or Canada." (Emphasis added.) [Exhibit P-73.]

123. In the course of that expansion 120 players were drafted from the six original clubs which had a reserve list of 37 players and a squad of 20. Clarence Campbell stated that that draft from the original clubs rosters could occur without lessening the level of play in the NHL. [Exhibit D-2, Swados Affidavit, pp. 24, 28; Exhibit P-73.]

124. The NHL has permitted a similar loss of skilled players in the successive expansion, since existing teams can protect only 15 players. [Exhibit P-58, at pp. 9, 12.]

125. In 1970, the NHL admitted two additional teams to its league, Vancouver and Buffalo. Each of those new clubs paid in excess of $8,000,000 for the acquisition of the local American Hockey League and Western Hockey League Clubs, for the acquisition of the territorial rights of the Western and American Hockey Leagues, and for distribution to NHL clubs. [Exhibit D-2, Swados Affidavit, p. 36.]

126. "Similar costs will be incurred by the Atlanta and Long Island Clubs entering the league this year." [Swados Affidavit at pp. 36-37; Exhibit P-38, Wirtz Deposition, pp. 12-15.]

Findings of Fact Relating to NHL Reaction to Announcement of WHA Formation

127. The WHA was formed in 1971. The NHL learned of the organization of the league by at least August 1971, and subsequent to that date the following events outlined in Findings of Fact 128-143, *infra*, occurred: [Defendants' Proposed Pretrial Order, Statement of Fact 22, Exhibit P-9.]

128. On August 4, 1971, a special and highly confidential NHL Presidential Study Committee was established to make recommendations with regard tc several problems faced by the NHL in the light of the formation of the WHA. The Committee had representatives from six of the member clubs of the NHL. [Exhibit P-9, at pp. 2-3.]

129. The initial meeting of th special NHL Study Committee was held in New York City on September 15, 1971, the agenda calling for the consideration of:

(1) The implication of the proposed formation of the World Hockey Association;

(2) All aspects of future expansion of the NHL; and

(3) *The preservation of the reserve clause in the Standard Player's Contract.* (Emphasis added.) [Plaintiffs' Amended Supplemental Consolidated Proposed Pretrial Order, Plaintiffs' Statement of Fact 27 (admitted in Defendants' Proposed Pretrial Order); Exhibit P-9.]

130. That Study Committee amended Provision 13(c) of the Standard Player's Contract for use by NHL clubs in 1972-73 removing the club's right to unilaterally void the Contract in order to make the Standard Player's Contract more "bilateral." This change was initiated by the owners and not by the Players' Association. [Exhibit P-51.]

131. As a result of a report of the NHL Study Committee, the Board of Governors of the NHL at its October 25-27, 1971 meeting made certain changes in the Standard Player's Contract, including the elimination of Paragraph 13(c) and further called a special meeting of the Board for November 9 to consider expansion. [Exhibit P-39, Minutes of Board of Governors Meeting on October 25-27, 1971, at 5, 6.]

132. At the November 8-9, 1971 special meeting the Board of Governors awarded franchises to the territories of Long Island and Atlanta, each franchise to cost $6,000,000 before territorial indemnification. [Exhibits P-27, Campbell dep., pp. 143-144; P-39, Minutes of Board of Governors Meeting on November 8-9, 1971, at 2; P-10, Campbell Press Release; P-58].

133. The franchises were awarded to territories before the individual owners were selected. [Exhibit P-27, Campbell dep., p. 136.]

134. Prior to November, 1971, the NHL Board of Governors was aware that the WHA was interested in obtaining a lease for its franchise in the New York metropolitan area in the Nassau Coliseum which was presently under construction in Hempstead, Long Island. [Exhibit P-41.]

135. The Nassau Coliseum together with Madison Square Garden are the only two arenas in such metropolitan area suitable for major league professional hockey. The new WHA franchisee's efforts to obtain a lease on the Nassau Coliseum were rejected by William Shea, "Sports Consultant" of that institution, who is also a

member of the Board of Directors of the Los Angeles Kings, a defendant in this action and a member of the NHL. [Plaintiffs' Amended Supplemental Consolidated Proposed Pretrial Order, Plaintiffs' Statement of Fact 32 (admitted in part in Defendants' Proposed Pretrial Order); Exhibits P-40, P-41.]

136. In January, 1972, a committee of the Board of Governors of the NHL recommended the award of the Long Island franchise to a group headed by Roy Boe who was also the owner of the New York franchise in the American Basketball Association. By December 28, 1971, Mr. Boe who had agreed upon an indemnification fee of $4,000,000 to the New York Rangers and had acquired a satisfactory lease for the Nassau Coliseum, therefore, was awarded the franchise. [Exhibit P-39, Minutes of NHL Board of Governors Meeting for January 24, 25, 1972 at 2; Exhibit P-38, Wirtz Dep., p. 26.]

137. In late May, 1972, the NHL Board of Governors established a Legal Committee whose duties, *inter alia*, were to develop and implement a policy with regard to players who had signed contracts with the WHA. The Legal Committee promptly employed the law firm of Covington & Burling in Washington, D.C., to aid in this task. [Exhibit P-39, Minutes of NHL Board of Governors Meeting for June 6, 1972, at 23; Exhibit P-37, Swados Dep., pp. 27, 29-30.]

138. During the summer President Campbell suggested to all member teams that they send a form letter to all players, particularly those who had signed with the WHA reminding them of the club's contract rights and, at the club's option, raising the question of litigation to enforce the reserve clause. [Exhibits P-13(a), P-14; P-27, Campbell Dep., p. 200.]

139. At a later date a further letter was circulated by member teams and used by many of those teams to de-

mand a return of players who had signed with the WHA. [Exhibit P-37, Swados Dep., pp. 33-35; Exhibit P-16.]

140. Member clubs of the NHL have circulated to particular players letters substantially similar in form and substance, wherein such player is threatened with legal action if he does not return to the NHL. [Exhibit P-16; Findings 190-197, *infra.*]

141. Since the advent of the World Hockey Association, salaries have increased even for those players who have remained with the National Hockey League. [Exhibits P-24, P-69, Allen Dep., pp. 222, 256.]

142. As of the present date NHL member clubs have instituted at least 11 legal actions against NHL players who have signed contracts with WHA teams. The targets of the suits have included several well-known players, such as Bobby Hull, Derek Sanderson, and Gerry Cheevers. [Plaintiffs' Amended Supplemental Consolidated Proposed Pretrial Order; Statement of Fact 46 (second sentence admitted in Defendants' Proposed Pretrial Order); Exhibit P-27, Campbell dep., pp. 243-45; Exhibit P-49.]

143. In these legal actions the NHL teams have sought judicial enforcement of paragraph 17 of the Standard Player's Contract, requesting, *inter alia,* injunctions against the particular player from playing for other than the NHL team owning his contract. [Plaintiffs' Amended Supplemental Consolidated Proposed Pretrial Order; Statement of Fact 47 (admitted in Defendants' Proposed Pretrial Order.]

FINDING OF FACT RELATED TO PLAINTIFF-COUNTERCLAIMANT McKENZIE

144. Plaintiff-counterclaimant McKenzie is 34 years old and has been a major league professional hockey player

for 14 years, playing at the position of right wing. [Exhibit P-77, ¶ 2.]

145. Major league professional hockey is the only trade or endeavor in which McKenzie can utilize his talents and skills to maximize his vocational satisfactions and income. [Exhibit P-77, ¶ 3.]

146. Because of the tremendous requirements of skill, speed and stamina plus the ability to take tremendous physical punishment, professional major league hockey players have a limited number of potential high-earning years during their career. [Exhibit P-77, ¶ 4.]

147. Until the recent birth of the WHA, the National Hockey League has been the only major professional hockey league; and major league professional hockey caliber players like McKenzie, in order to play major league professional hockey at all, have been required to play for and negotiate compensation only with the NHL team holding an NHL Standard Player's Contract, which has uniformly retained the so-called "right to renew" clause in paragraph 17. [Exhibit P-77, ¶ 5.)

148. The last contract which McKenzie signed with an NHL team is the Standard Player's Contract, dated September 1, 1971, entered into between McKenzie and the Boston Bruins, which contract by its terms expired on September 30, 1972. [Exhibits P-75; P-77, ¶ 6.]

149. Paragraph 20 of the Standard Player's Contract signed by McKenzie [Exhibit P-75] provides as follows:

> "It is severally and mutually agreed that the only contracts recognized by the president of the league are the standard player's contracts which have been duly executed and filed in the league's office and approved by him."

150. There is no evidence that between September 1, 1971 and September 30, 1972, the stated term of McKen-

zie's NHL Standard Player's Contract, McKenzie agreed to amend, modify or in any way alter the terms of the aforesaid contract.

151. McKenzie played hockey for the Boston Bruins in the National Hockey League during the 1971-72 playing season. Every player during that season was a member of the NHL Players' Association, which negotiated the Arbitration Agreement of March 29, 1972. Verified Complaint in No. 72-1807, ¶ 10.

152. The NHL Standard Player's Contract, subject only to § 2.2(a) of the NHL By-Laws, is inviolate and cannot be modified even by the President of the league. [Exhibit P-25, at 568.]

153. The NHL By-Laws in § 2 specifically refers to, incorporates, adopts and requires the Standard Player's Contract. Section 2.2 of the By-Laws provides as follows:

> "2.2 The following standard forms are authorized:
>
> *Standard Player's Contract.* A contract to play hockey for a Member Club shall be made on a standard player's *contract as adopted by the Governors,* which form is contained in Appendix I to these By-Laws. *The provisions thereof shall not be changed or derogated from except as may be authorized by resolution of the Governors . . .*" (emphasis added).

154. There is no evidence that the so-called arbitration agreement of March 29, 1972, relied on by defendants has ever been formally approved or adopted by the Board of Governors of the National Hockey League, as required by NHL By-Laws 2.2(a).

155. Prior to being assigned to the Philadelphia Flyers, as part of the 1972 "Expansion II" intra-league draft, McKenzie was left "unprotected" by the Boston Bruins and therefore exposed to possible draft by either the New

York Islanders or Atlanta Flames, the new expansion teams. [Exhibit P-70 at 29, 45; Exhibit P-69 at 264.]

156. McKenzie was left "unprotected" by the Boston Bruins organization, because it felt that it had excellent young players whom it could not afford to lose. [P-69 at 265.]

157. Neither the Islanders nor the Flames, the 1972 expansion teams, picked up McKenzie as part of the intra-league draft. [Exhibits P-70 at 29, 42; P-77, ¶ 7, P-69 at 266.]

158. Although McKenzie was not on the "protected list" of the Boston Bruins at the commencement of the expansion draft proceedings in 1972, he was placed on the list immediately after the first Boston Bruins player was drafted. Since McKenzie was then a "protected player" he could not thereafter be drafted by either of the NHL expansion clubs. [Ex. P-68 (Allen), p. 266.]

159. In June 1972, McKenzie signed a three year contract with the Philadelphia Blazers of the WHA, as player and head coach, at an annual salary of $100,000. [Exhibit "B" to Complaint in C.A. No. 72-1902; Exhibit P-77, ¶ 8.]

160. Players are almost never consulted prior to a player contract assignment by the NHL clubs holding their contracts whether and where the player should be assigned. [Exhibits P-69, at 258-59 and P-34 at 55.]

161. On July 27, 1972, the Bruins assigned McKenzie's contract to the Flyers. [Exhibit P-70 at 32, 45.]

162. The consideration for the assignment of McKenzie's contract was $30,000 cash [Exhibit P-70 at 32, 34, 37, 45, 47, 50], less than the "waiver" or minimum price permitted for an intra-league assignment by the NHL By-Laws. [Exhibit P-4, § 16A.3.]

163. Boston never informed McKenzie of its assignment of McKenzie's contract to the Flyers. [Exhibit P-70 at 42, 44, 55, 57.]

164. At the end of July, McKenzie received a telephone call from Don Earle, former broadcaster of Boston Bruins games who invited McKenzie to meet with his "bosses" at Joe's Aquarium restaurant in Boston on the evening of August 2, 1972; McKenzie was led to believe that Earle's "bosses" were in the communications or advertising fields and wished to speak with McKenzie regarding opportunities for him in these areas. [Exhibit P-77, ¶ 10; P-70 at 45, 58.]

165. Earle's telephone call to McKenzie to arrange the meeting was ordered by Edward Snider, Chairman of the Board and owner of the Philadelphia Flyers. [Exhibit P-70 at 40-42, 53-55.]

166. On August 2, 1972, after attending a meeting with Snider and Gilbert Stein, Esq., General Counsel of the Flyers, McKenzie for the first time was informed of the assignment of his contract by the Bruins to the Flyers. [Exhibits P-70 at 42-43, 55-56; P-77, ¶ 11.]

167. At the August 2, 1972 meeting, McKenzie was offered by the Flyers a five-year playing contract at $100,000 per year, plus an additional five-year contract at an undetermined salary in an undisclosed capacity in the Flyers' management. [Exhibits P-36 at 123, 124; P-77, ¶ 12.]

168. Subsequent to August 2, the Flyers' offer to McKenzie, referred to above, was repeated but also was coupled with the threat that should a court of law enjoin McKenzie from playing for any other team than the Flyers, the offer would be withdrawn and any contract would only be for one year at $100,000 per year. [Exhibit P-77, ¶ 12; P-36 at 121, 123, 124].

169. On August 10, 1972, counsel for McKenzie informed Stein that McKenzie would keep his contract with the Blazers and his word to the hockey fans of Philadelphia by playing for the Blazers, and that he would not under any circumstances negotiate with or play for the Flyers. [Exhibits P-36 at 112-14; P-77, ¶ 13].

170. On September 6, 1972, the Flyers filed a Complaint in Equity in Philadelphia Common Pleas Court (September Term 1972, No. 378), which was removed to this Court on September 13, 1972 (C.A. No. 72-1807), seeking an injunction not only to prevent McKenzie from playing on the Blazers hockey team, but also to prevent him from acting as their head coach, and to prevent him from being paid by the Philadelphia Blazers. [Complaint-Equity, C.A. No. 72-1807, p. 8; Exhibit P-77, ¶ 14].

171. Prior to October 1, 1972, when all parties agree McKenzie was contractually bound under his contract with Boston, and after the assignment of that contract to the Philadelphia Flyers (which assignment also took place prior to October 1, 1972), McKenzie in violation of his contract engaged in extensive promotional and advertising activities on behalf of the Philadelphia Blazers. Exhibit D to Verified Complaint in C.A. 72-1807; Ex. P-75, ¶ 8.

172. If McKenzie is not permitted to play or to coach the Blazers this year—the opening and therefore financially crucial season for the Blazers—on account of enforcement of the reserve clause, he and hockey players and coaches like himself will not have the opportunity to negotiate the competitive salaries occasioned by the birth of the WHA, or even in some cases to play major league professional hockey at all. [Exhibits P-77, ¶ 15; P-24 at 222; P-69 at 256-257].

173. McKenzie asserts that he will not play for the Flyers during the 1972-73 season or any other season. [Exhibits P-77, ¶ 13; P-36 at 112-114].

174. If McKenzie is not allowed to play as a member of the Blazers team during the upcoming year, as a result of enforcement of the reserve clause, at the present stage of his career, McKenzie may never be able to play major league professional hockey again due to the rigorous requirements of continuing exercise, coordination and competitive team play. [Exhibit P-77, ¶ 16].

175. The loss of McKenzie's services to the Blazers would be severe and irreparable; McKenzie is not only a player, but head coach of the Blazers, whose team has to date played thirteen league games, losing eleven. The competitive accomplishments and financial success of the Blazers would be adversely affected if McKenzie is precluded from coaching and playing with the Blazers.

176. McKenzie recently broke his right arm and was then advised by his physician that he would be unable to play for approximately four to six weeks. The Blazers opened their season on October 12, 1972. Although McKenzie shall not be able to play until his arm heals, the Blazers require his services as their head coach. [Exhibit P-77, ¶ 14.]

177. The Flyers will suffer no substantial prejudice if they play without McKenzie or if McKenzie plays and coaches for the Blazers.

Even if the Flyers sustain some injury, such harm would be insubstantial and the balance of hardship clearly would favor McKenzie. The Flyers presently have under contract four right wings of major league professional hockey caliber, exclusive of consideration of McKenzie (the validity of whose contract is challenged herein), plus other players of similar caliber who also can play right wing. [Exhibit P-69 at 266-267].

178. If McKenzie is not permitted to play for or coach the Philadelphia Blazers, the Blazers have agreed to pay McKenzie in the event he is enjoined and have agreed to indemnify McKenzie for legal expenses or any money judg-

ment against him resulting from the execution of the contract with the Blazers. [Ex. P-76, addendum ¶ 4.] Even if McKenzie is indemnified by the Blazers, the Blazers will suffer the dual and substantial hardships of paying McKenzie large sums of money and operating without his services as a player and coach.

Irreparable Injury and Right to Equitable Relief

179. The NHL was organized in 1917 and consisted of only six teams during the entire 25-year period preceding its expansion to twelve teams in 1967. The WHA, on the other hand, held the first meeting of its incorporators on July 1, 1971, and seeks to create a viable major professional hockey league of twelve teams in little more than one year. [Ex. D-2 (Swados), pp. 21-22; Ex. D- 8, p. 1.]

180. The founders of the WHA started on the premise that they probably would not be able to get many players from the NHL to play for the new league, and for budgetary reasons would not want too many NHL players, and that they therefore should draw players from all the minor leagues, including the International and Eastern leagues, from the amateur leagues, and from the European leagues. They believed that these leagues offered a great reservoir of players from which the WHA could procure a number of talented hockey players. [Ex. D-115; Ex. D-135 (Murphy), pp. 69-71; Ex. D-8, pp. 152-153.]

181. Since the formation of the WHA in 1971, it and its member teams have nevertheless planned to induce many players under contract to NHL teams to disregard the "reserve" clause in their 1971-72 contracts and to sign a contract to play for a WHA team in the 1972-73 hockey season. [Ex. D-8, pp. 22, 26; Ex. D-9, pp. 6, 9; Ex. D-10; Ex. D-22; Ex. D-23.]

182. The WHA entered into an employment agreement with one Steven Arnold, an agent for various professional

athletes (including hockey players), pursuant to which Arnold agreed to assist the WHA and its clubs to sign to WHA contracts players whom the WHA teams had "drafted" from the NHL and other leagues. Arnold was given the exclusive right to negotiate with certain such players on behalf of the WHA teams which had "drafted" them. The WHA agreed to pay Arnold a fixed salary plus a bonus of $1,500 for each minor league player, $2,500 for each NHL player, and $5,000 for each NHL "star" he signed to a WHA contract. Arnold has been successful in persuading numerous players under contract to NHL teams to disregard the "reserve" clause in their 1971-72 contracts and to sign contracts to play for WHA teams in 1972-73. [Ex. D-10; Ex. D-23; Ex. D-22; Exs. D-12 through D-20.]

183. In order to induce Bobby Hull, an NHL "superstar" to disregard the "reserve" clause in his contract with the Chicago Blackhawks covering the 1971-72 season, each member club of the WHA agreed to pay its pro rata share of a million-dollar bonus offered Bobby Hull to sign a contract with the WHA club which "drafted" him (the Winnipeg Jets). Bobby Hull accepted the offer, signed a contract with the Winnipeg Jets, and has been paid the million-dollar bonus. [Ex. D-9, p. 30; Ex. D-8, pp. 88-89, 118-119, 142; Ex. D-73; Ex. D-134 (Davidson), pp. 81-86; Ex. D-135 (Murphy), pp. 154-159.] The record is devoid of any evidence that any two NHL clubs have agreed to share collectively the cost of retaining any NHL star in the NHL.

184. During the entire period of time that the WHA and its member clubs have planned to induce and have induced players under contract to NHL teams to disregard the "reserve" clause in their NHL contracts, the WHA and its member teams have been well aware that no court has ever held the NHL "reserve" clause to be invalid or unenforceable and that, if tested, the NHL "reserve" clause might be upheld by the courts. [Ex. D-112; Ex. D-66; Ex. D-100,

p. 3, ¶ 4; Ex. D-101, p. 5, ¶ 4; Ex. D-102, p. 3, ¶ 6; Ex. D-105, p. 5; Ex. 106, p. 4.]

185. Since its formation in the summer of 1971, the WHA and its member teams have planned to engage in antitrust litigation against the NHL and its member teams challenging the validity of the NHL "reserve" clause. [Ex. D-8, pp. 17, 27, 59; Ex. D-9, pp. 20, 21(B); Ex. D-134 (Davidson), pp. 41-42.]

186. Shortly after its formation, the WHA and its member teams established a legal committee and retained special outside counsel in order to prepare for the contemplated antitrust litigation and to draft a complaint against the NHL and its member teams which would challenge, *inter alia,* the validity of the NHL "reserve" clause under the antitrust laws. As early as September 24, 1971, special outside counsel gave a report to the WHA board regarding "the legal problems which the league would be faced with in conjunction with the NHL."

187. By February 11, 1972, a draft of a complaint against the NHL and its member teams had been completed, the WHA and its member teams had approved its filing, and the legal committee and outside counsel of the WHA were instructed by the WHA Executive Committee to put the complaint into final form as quickly as possible. [Ex. D-9, p. 20; Ex. D-8, p. 59.]

188. Despite these preparations, neither the WHA nor any of its member teams chose to seek a declaratory judgment as to the validity of the NHL "reserve" clause before inducing NHL players to jump to the WHA and before making the financial investments necessary to establish a new league. Instead they chose to wait until August 18, 1972, to file the first of several complaints against the NHL and its members and even then did not seek preliminary relief from enforcement of the "reserve" clause until September 18, less than a month before the opening of the

WHA season. [Complaint and Motion for Temporary Restraining Order and Preliminary Injunction in C.A. 72-1661.]

189. 111 of the 158 players signed as of July 21, 1972 by the 12 teams of the WHA for the 1972-73 playing season were subject to reserve clauses in their 1971-72 contracts with the NHL, AHL, CHL and WHL [Exhibit D-116]. Presently, more than 200 of the 345 of the players signed to WHA teams were subject to reserve clauses in their 1971-72 contracts with the NHL, AHL, CHL and WHL. [Exhibit D2, Swados Affidavit, § 5 at 8; Exhibit- D-131]. Approximately 58 to 60 of these 200-plus players played for an NHL team during the past season. The remainder (more than 140 players) played with a minor league team last year; [Ex. D-2 (Swados), p. 8; Ex. D-134 (Davidson), p. 68; Ex. D-131.]

190. Defendants by letter have threatened many of the players subject to the reserve clause in the 1971-72 contracts who signed or negotiated with WHA teams with the intention to take all steps necessary to enforce the reserve clause. [Exhibit P-16].

191. Letters sent by the New York Rangers, Pittsburgh Penguins, Montreal Canadians, Minnesota North Stars, California Golden Seals, Boston Bruins, and Buffalo Sabres of the NHL and the Baltimore Clippers of the AHL to players who reportedly had signed with WHA teams contained the following language:

> "The purpose of this letter is to:
>
> 1. Remind you that you are under a contract which requires you to sign a Standard Player's Contract with the [name of team] for the season 1972-73, and
> 2. To notify you that we intend to enforce that contract."

[Exhibit P-16].

192. The Buffalo Sabres, in addition to the letters containing the above language, sent a letter to Steve Cuddie dated July 20, 1972 stating:

> "I have been told that you have already made an agreement with the WHA, but I have no way of knowing that is true. I must remind you that it is possible that we may go to the courts in order to protect our interests; and regardless of what other people say, we are talking from great strength."

[Exhibit P-16]

193. The St. Louis Blues sent out letters containing the following language:

> "I wish to bring your attention to the fact that you have a contract with Missouri Arena Corporation a/k/a St. Louis Blues to play for it, which they intend to enforce."

[Exhibit P-16]

194. The Philadelphia Flyers sent letters containing the following language:

> "I trust that you will see fit to comply with your contract and spare all of us any unnecessary litigation."

[Exhibit P-16]

195. The Chicago Blackhawks sent a letter to Andre Lacroix dated August 1, 1972 containing the following language:

> "Wherever required, the Black Hawks fully intend to take all steps necessary to protect their rights and interests and to enforce the terms of their contracts."

[Exhibit P-16]

196. The Toronto Maple Leafs sent letters containing the following language:

"I know you are aware that under the terms of your Standard Player's Contract, you are committed to play hockey for the Toronto Maple Leafs next season and precluded from playing hockey for any other team. If necessary, we intend to enforce the terms of that contract."

[Exhibit P-16]

197. The Detroit Red Wings sent letters containing the following language:

"We have heard reports that you have either signed or intend to sign a contract with some other hockey club. If these reports are correct, I believe you should immediately consult your attorney so as to be fully apprised of your obligations to the Detroit Hockey Club. As you are aware the Detroit Hockey Club has always fulfilled its obligations to you under its contracts. We, therefore, expect you to fulfill your obligations to it. You should know that we intend to take all necessary legal action to enforce these contracts."

[Exhibit P-16]

198. Of the more than 200 players signed by WHA teams who were subject to a "reserve" clause in their 1971-72 contracts, in the case of the NHL Clubs subject to the jurisdiction of this Court, only seven players have been sued in state or federal court proceedings now pending (Sanderson, Cheevers, Barrie, Johnson. Woytowich, Hull, and McKenzie). These suits have been consolidated for trial and involve only two state court and two federal court proceedings. In each of these cases, so far as the record at this stage of the proceedings shows, the decision to bring suit was not arrived at other than unilaterally by the club involved. [Ex. P-64 (Exhibit B); Ex. D-129 (Wirtz), pp. 61-62; Ex. D-128 (Mulcahy), pp. 24-25; Ex. D-121 (Campbell), pp. 222-224.]

199. Of the seven players presently being sued by the NHL clubs subject to the jurisdiction of this Court, only four (Barrie, Johnson, Woytowich, Hull) have been enjoined (temporarily pending a hearing) from playing with a WHA team. All these injunctions are by state courts. Thus, of the 345 players who have signed WHA contracts, only four or five are presently enjoined from playing with their WHA teams as a result of the enforcement of the NHL "reserve" clause. (Nassau Sports, Limited (New York Islanders) has a restraining order against Peters, a player claimed by the New York Raiders of the WHA. They have also brought five other player suits, but have no one else under restraint.)

200. This court takes judicial notice of the fact that in the case of Boston Professional Hockey Ass'n v. Sanderson, 348 F.Supp. 261 in the United States District Court for the District of Massachusetts, the defendant and the intervenor Philadelphia Blazers of the WHA in the Sixth Defense to their Answers both took the position that:

"the plaintiff not only delayed unreasonably in bringing this action so that it is not entitled to relief, but also approved defendant Sanderson's actions and abandoned any right to negotiate with defendant Sanderson concerning extension or renewal of its alleged contract, upon which conduct both defendant and the Philadelphia Blazers have relied, so that plaintiff is estopped to seek relief in this action." [15]

In anticipation of the position taken in defense against the complaint in *Sanderson*, the NHL teams were justified both in tendering (as required by paragraph 17 of the

[15] The language quoted is found in the Sixth Defense of the Answer filed by the intervenor Philadelphia Blazers. The Sixth Defense contained in defendant Sanderson's Answer is identical in its terms, with the exception that it does not refer to Sanderson by name.

NHL contract) new contracts to their players who had reportedly signed with a WHA team and in putting them on notice of the team's intent to enforce their NHL contracts, in order to avoid any possible claim of estoppel.

201. Bobby Hull is recognized as one of the greatest living hockey players and is widely known throughout Canada and the United States. [Exhibit P-62, Stukus Affidavit, at ¶ 3; Exhibit P-63, Kaiser Affidavit, at p. 2.]

202. The presence of Bobby Hull as a player is, in the opinion of the management of the Winnipeg Jets, essential to the financial well-being and continued operation of the Winnipeg Jets. Hull's absence may well jeopardize the continued existence of major league professional hockey in Winnipeg, Canada. [Exhibit P-62, Stukus Affidavit, at ¶¶ 4, 6; Exhibit P-63; Kaiser Affidavit, at p. 203.]

203. The new league, composed of fledgling teams will be dependent upon gate receipts, concession receipts and monies received from radio and electronic media. Players such as Hull, with their popularity, will be a major factor in the success of the new league. [Exhibit P-63, Kaiser Affidavit, at p. 2.]

204. There are more than 200 additional players besides Hull who played under contracts whose terms have expired for the NHL, CHL, AHL or WHL in 1971-72 and who desire to play and who have contracted to play for WHA teams in 1972-73. [Exhibit D-2, Swados Affidavit, § 5 at p. 8; Exhibit P-64, Cooper Affidavit, at ¶ 19.]

Pending and threatened litigation by NHL member teams against players who have signed with WHA teams misleads and confuses these players and may cause them to disregard their contractual commitments to the WHA. [Exhibit P-64, Cooper Affidavit, at ¶ 19.]

205. The uncertainty which surrounds the status of Hull and other professional players has caused the WHA to be

unable to negotiate favorable media contracts, and has hampered ticket sales. [Exhibit P-64, Cooper Affidavit, at ¶ 18; Exhibit P-63, Kaiser Affidavit, at p. 3.]

206. Continued player suits on the basis of the reserve clause will cause the WHA to make substantial expenditures in legal fees. [Exhibit P-64, Cooper Affidavit, at ¶ 12.]

207. Injunctions against players who have signed with WHA teams prohibiting them from playing for their WHA teams would signal the death of the World Hockey Association. [Exhibit P-78, Cooper Testimony in Sanderson, at p. 50].

208. The total effect of the NHL's conduct will be to destroy the economic viability of the new league and to return to the NHL their monopoly over major league professional hockey. [Exhibit P-64, Cooper Affidavit, at ¶¶ 10, 12, 18, 19, 20, 21; Exhibit P-78, Cooper Testimony in Sanderson, at p. 50; Exhibit P-63, Kaiser Affidavit, at p. 3].

209. If the WHA should be driven out of business, the public and players would lose the benefit of competition which has already raised players' salaries and made hockey available to new audiences. [Exhibit P-26, Campbell Senate, at p. 535; Exhibit P-32, Mulcahy Dep., at p. 2-88].

210. Some of the injury which the WHA will incur in the absence of a preliminary injunction might have been mitigated if the WHA had attempted to establish its new league on a more modest scale, e. g., with six teams, instead of teams in twelve cities in a little more than one year.

211. While the WHA has contracted with players from many sources, the WHA has contracted with former NHL players only when the NHL contracts expired by September 30, 1972 [Transcript, October 9, 1972, pp. 26-27; Finding 89, *supra*].

212. Any conclusion of law which should also be deemed a finding of fact is incorporated herein by reference.

III.

The Labor Exemptions of the Sherman Act

A preliminary issue is whether the National Hockey League is entitled to invoke the labor exemptions from the Sherman Act authorized by §§ 6 and 20 of the Clayton Act, 15 U.S.C. § 17,[16] 29 U.S.C. § 52.[17] For reasons which hereinafter follow, I conclude that the labor exemptions are not applicable and the National Hockey League is subject to the operations of the anti-trust laws.

Initially, the status of the National Hockey League Players' Association (hereinafter referred to as "Players' Association") must be considered to ascertain if it qualifies as a "labor organization" under § 2(5) of the National

[16] Section 6 of the Clayton Act provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

[17] Section 20 of the Clayton Act states in relevant part:

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney."

Labor Relations Act, 29 U.S.C. § 152(5).[18] The record indicates that on June 7, 1967, a "Recognition Agreement" was executed between the owners of the National Hockey League and the Players' Association, whereby the Association would be regarded as the official representative of the players in their dealings with the member teams of the National Hockey League. The record, however, does not disclose whether the designation of the Players' Association complied with the provisions of § 9 of the National Labor Relations Act, 29 U.S.C. § 159. I cannot definitively conclude that the National Labor Relations Board has actually certified the Players' Association as the approved collective bargaining representative.

But even if the Court assumes, *arguendo,* a duly authorized collective bargaining representative exists, labor-employer activities are not entirely immune from the anti-trust laws. The history of labor exposure to anti-trust liability has not been ideologically and homogeneously consistent, but certain standards have been articulated by the courts which can be applied to the present factual context. *See generally,* 7 J. O. von Kalinowski, Anti-Trust Laws and Trade Regulation, §§ 48.01 et seq., pp. 48-1 to 82 (1971), and the references cited therein.

In United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941), the Supreme Court sought to adumbrate the outer perimeters wherein labor unions would not be prosecuted under and insulated from the regulations of the Sherman Act. In order not to lose this exemption, the two caveats imposed by the Court were that the "union

[18] Section 2(5) of the National Labor Relations Act stipulates:

"The term 'labor organization' means any organization of any kind, or any agency or employer representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

acts in its self-interest and does not combine with non-labor groups". 312 U.S. at 232, 61 S.Ct. at 466.

The latter limitation enunciated in *Hutcheson* was reinvigorated in Allen Bradley v. Local Union No. 3, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939, rehearing denied, 326 U.S. 803, 66 S.Ct. 11, 90 L.Ed. 489 (1945). In *Allen Bradley*, the Supreme Court declared the union activities to be in contravention of the Sherman Act when the union combined with all local contractors and manufacturers to restrain trade in and monopolize the supply of electrical equipment in the New York City area. While undoubtedly the "hot cargo" clause contained in the collective bargaining agreement furthered the union interests, the Court held that ". . . Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." 325 U.S. at 808, 65 S.Ct. at 1539. Moreover, the Court continued, ". . . when the unions participated with a combination of business men who had complete power to eliminate all competition among others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts." 325 U.S. at 809, 65 S.Ct. at 1540. Finally, the Court remarked:

> "The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves." 325 U.S. at 809-810, 65 S.Ct. at 1540.

The Supreme Court was again presented the opportunity to examine the *Allen Bradley* doctrine in United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). The Court reaffirmed the labor exemption position previously adopted in *Allen Bradley* and made it indisputably clear that ". . . [a collective bargaining] agreement resulting from union-employer negotiations is [not] automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement." 381 U.S. at 664-665, 85 S.Ct. at 1590.

In invalidating the wage scale the union sought to impose on all the coal mine operators in *Pennington*, the Court further stated "there are limits to what a union *or an employer may offer or extract* in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." (Emphasis added.) 381 U.S. at 665, 85 S.Ct. at 1591. Unions (and derivatively, employers) will not be shielded from the enforcement of anti-trust legislation against them when they do not act alone and function in concert with non-labor groups to effectuate their labor goals and policies. See, also, Ramsey v. United Mine Workers, 265 F.Supp. 388 (E.D. Tenn.1967), aff'd 416 F.2d 655 (6th Cir. 1969) (en banc), rev'd on other grounds 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed. 2d 64 (1971); South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (6th Cir. 1970), cert. denied 402 U.S. 983, 91 S.Ct. 1662, 29 L.Ed.2d 149 (1971), rehearing denied 404 U.S. 877, 92 S.Ct. 28, 30 L.Ed.2d 124 (1971).

While the Union activities in Meat Cutters Local Union 189 v. Jewel Tea Co., 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed. 2d 640 (1965), were held to be outside the scope of the Sherman Act, the National Hockey League (the employer) is not a beneficiary of that decision in behalf of the union. First, the Court in *Jewel Tea* noted there was no claim

raised of union-employer conspiracy, and, second, the collective bargaining dispute related to an area in which the union had forcefully negotiated:

> "Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision through *bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of* or in combination with non-labor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." (Emphasis added.) 381 U.S. at 689-690, 85 S.Ct. at 1602.
>
> "The crucial determinant is not the form of the agreement—e. g., prices or wages—but its *relative impact* on the *product market* and *the interest of union members.*" (Emphasis added.) Footnote 5, 381 U.S. at 690, 85 S.Ct. at 1602.

From my examination of the foregoing cases, several conclusions can be drawn. First, those cases all involved situations where the union had been sued for its active, conspiratorial role in restraining competition of a product market, and the union, not the employer, sought to invoke the labor exemptions. Here there is no evidence that the Players' Association was a joint-conspirator with the National Hockey League in creating and retaining the reserve clause. The evidence establishes the Players' Association's persistent opposition to the present form of reserve system. The reserve clause, in fact, was more than a sturdy teenager when the Players' Association was born. The reserve clause was fathered by the NHL, and the Players' Association has repeatedly sought to exclude it in its present form.[19]

[19] See Findings of Fact 106-111, *supra*.

Second, the cases cited above pertained to issues which furthered the interests of the union members and on which there had been extensive collective bargaining Again, that is not true in this litigation. The National Hockey League has not come forward with any substantial evidence which could warrant this Court finding that the reserve clause—as it presently operates in conjunction with the other interlocking agreements—was ever a subject of serious, intensive, arm's-length collective bargaining. When the Player's Association was recognized in 1967, some variation of the reserve system had existed for probably sixteen years prior thereto. Subsequent efforts by the Association to markedly revamp the reserve system have been continually rebuffed by the NHL. The discussions revolving around the Arbitration Agreements related only to resolving salary disputes, and did not in any way alter or affect the basic perpetual option of the reserve system.[19A]

Finally, even if, *arguendo*, there had been substantial arm's-length collective bargaining by the National Hockey League and the Players' Association to revise the perpetual option provision of the reserve clause (see, e. g., Exhibits D–59–64; D–2, ¶ 10, App. A; and D–129, p. 50), those negotiations would not shield the National Hockey League from liability in a suit by outside competitors who sought access to players under the control of the National Hockey League.

> "A stronger argument might be made by a newly-formed league that a collective agreement between an established league and players' union which, for example, permitted suits for injunction against players who attempted to 'jump' leagues, was designed to prevent the new league from gaining access to the best

[19A] See Findings of Fact 77-111, *supra*, and discussion at pages 505-509, *infra*.

players and to cosign it permanently to second class status. This claim is similar to the one which succeeded in Allen Bradley: a union-employer combination to exclude entry by newcomers." (Jacobs and Winter, "Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage," 81 Yale L.J. 1, (1971).

Even if the benefits of the labor exemptions can be extended to encompass the employer's activities, that outcome is not changed merely because the employer is a member of a multi-employer association. A multi-employer, group will not be accorded any greater protections than a single employer. Though a multi-employer organization will be insulated from unfair labor practice prosecutions only if it acts in good faith and takes only the limited steps necessary to protect itself, see *e. g.*, NLRB v. Truck Drivers Local 449, 353 U.S. 87, 77 S.Ct. 643, 1 L.Ed.2d 676 (1957), however, restraining, anti-competitive acts will not be immunized from the Sherman Act. Cf. Kennedy v. Long Island R.R., 319 F.2d 366, 370-373 (2nd Cir. 1963), cert. denied, 375 U.S. 830, 84 S.Ct. 75, 11 L.Ed.2d 61 (1963); Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America, 431 F.2d 1004, 1007 (5th Cir. 1970), cert. dismissed by consent, 404 U.S. 801, 92 S.Ct. 21, 30 L.Ed.2d 34 (1971). While the employer activities in the two latter cases were not subject to the Sherman Act, the Courts clearly intimated that employer efforts to monopolize a particular product market would not be similarly treated.

In providing a special exemption from Sherman Act regulations for labor unions and employers who in good faith negotiated with those unions, Congress attempted to accommodate what frequently were conflicting public policies: the fostering and preservation of competitive business conditions in a free enterprise system on one hand, counterbalanced by a legitimate concern in improving and bettering the working conditions of laborers

and the reduction of industrial strife through vigorous union organization and collective bargaining. The labor exemption which could be defensively utilized by the union and employer as a shield against Sherman Act proceedings when there was bona fide collective bargaining, could not be seized upon by either party and destructively wielded as a sword by engaging in monopolistic or other anti-competitive conduct. The shield cannot be transmuted into a sword and still permit the beneficiary to invoke the narrowly carved out labor exemption from the anti-trust laws. To allow and condone such conduct would frustrate Congress' carefully orchestrated efforts to harmoniously blend together two opposing public policies.

In sum, the National Hockey League, as it stands before me in the instant action, is not the most ideal candidate to be a beneficiary of the labor exemptions. The National Hockey League itself was primarily responsible for devising and perpetuating a monopoly over the product market of all professional hockey players via the reserve system. Not only did it enforce and implement its restraints against players and member clubs of the National Hockey League, but, moreover, it sought to enforce it against outside competitors who wanted to enter the competition at the professional level.

I reject the argument that an employer (National Hockey League) can conspire with or take advantage of a union to restrain competition and seriously impair the business dealings and transactions of competitors. To grant the National Hockey League an exemption in this proceeding would undermine and thwart the policies which have evolved over the years in disposing of labor-management and anti-trust disputes. I cannot compatibly reconcile the National Hockey League's monopolistic actions here with the labor exemptions from the Sherman Act. The NHL can do no more than could the employers and union in *Allen Bradley, supra.* Even if the National

Hockey League was primarily concerned about the welfare of its players, its purported good intentions would be insufficient to insulate its actions. As the Supreme Court so aptly stated over twenty years ago:

> "[B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." United States v. Women's Sportswear Mfg. Ass'n., 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805 (1949).

For the foregoing reasons, the National Hockey League cannot invoke the labor exemptions and is thus subject to a prosecution under the Sherman Act.

IV.

The Relevant Market

A. Relevant Product Market

The phrase "any part of the trade or commerce" in § 2 of the Sherman Act is the provision which mandates inquiry as to the relevant market. In United States v. Grinnell, 384 U.S. 563, 573, 86 S.Ct. 1698, 1705, 16 L.Ed. 2d 778 (1966), the Court stated:

> "We see no reason to differentiate between 'line' of commerce in the context of [(§ 7 of)] the Clayton Act and 'part' of commerce for purposes of [(§ 2 of)] the Sherman Act."

Thus, in the formulation of the legal standards which control the determination of product market, both § 2 Sherman Act cases and § 7 Clayton Act cases will be cited.

In the leading case discussing relevant product market, United States v. E. I. DuPont De Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956), the Supreme Court stated:

> "The varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal." 351 U.S. at 395, 76 S.Ct. at 1007.

The test of "reasonable interchangeability" relied on in *DuPont,* was reaffirmed in Brown Shoe Company v. United States, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523-1524, 8 L.Ed.2d 510 (1962), where the Court noted:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined, submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." [20]
> (Footnotes and citations omitted).

The NHL argues that the relevant market for anti-trust purposes should include at a minimum both major league professional hockey and minor league professional hockey. Further, the NHL urges that from a realistic view of hockey the relevant market should be expanded beyond the professional and semi-professional leagues to include

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[20] *Accord,* Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 454-456 (9th Cir. 1966).

also the amateur leagues. In contrast, the WHA asserts that the relevant market is only major league professional hockey, namely the hockey played today in the National Hockey League. I find that the relevant market is major league professional hockey. (Findings 19-49, *supra.*)

The rationale of International Boxing Club v. United States, 358 U.S. 242, 249-250, 79 S.Ct. 245, 250, 3 L.Ed.2d 270 (1959), is decisive here. From the vastness of innumerable boxing contests, the Court isolated as a relevant market championship boxing contests. They noted the common denominators of all boxing contents, whether championship or not, were: one ring, two boxers, and a fight under a similar set of rules, before a greater or lesser number of spectators. But, in spite of the apparent "physical identity of the product"[21], the determinative difference in championship bouts was money: more revenue from (1) more spectators, (2) television rights, (3) movie rights, and (4) higher ticket prices.

Similarly, any hockey match whether in the NHL, the minor professional hockey leagues, or in the amateur leagues always includes one hockey rink, 12 hockey players, two referees, and a similar set of rules, before a greater or lesser number of spectators. That major league professional hockey is the relevant product here is substantiated by my Findings 17-49, *supra,* of higher ticket prices, increased television revenue, and greater players' *skill* and *salaries.*

Of course, the consumer is no longer king in sports; he has lost the unilateral power to demand and always get high quality competition. Yet, though his voice is weak, he is not totally impotent. He can withdraw his support when the level of performance becomes so outrageously low that he feels the admission price does not justify the qual-

[21] International Boxing Club v. United States, *supra*, 358 U.S. at 249, 79 S.Ct. at 250, citing Brown Shoe Co. v. United States, 370 U.S. 294, 335-337, 82 S.Ct. 1502, 1530, 8 L.Ed.2d 510 (1962).

ity of performance observed. There is a point where even avid fans will not support minor league performances for major league prices. This residuum of discretion in the sports fan to refrain from paying high prices for low performance is an additional factor in separating the minor leagues from the major professional league market.

A review of the record convinces me that above all else, the NHL owners are probably more shrewd as businessmen than they are as enthusiasts of sports. It is inconceivable that they would pay much larger salaries to major league players for any reason other than the fact that these players are more skillful, generally have more professional hockey experience, and as a group at least in the profits returned to the owners are worth the salaries paid. This profit pattern of payment to the players conclusively establishes that major and minor league hockey players are not interchangeable products. Thus, viewing the evidence from the required "pragmatic, factual approach"[22] I have evaluated the industry in terms of the "commercial realities"[23]. I hold that there is no competent evidence from which a court could even infer that semi-professional leagues and the NHL compete with respect to players. I find the relevant product market to be major league professional hockey as it is currently played in the NHL.

B. Relevant Geographic Market

In Brown Shoe Co. v. United States, 370 U.S. 294, 336-337, 82 S.Ct. 1502, 1530, 8 L.Ed.2d 510 (1962), the Supreme Court articulated the requirements for selecting the appropriate and relevant geographic market. The Court noted as follows:

> "The criteria to be used in determining the appropriate geographic market are essentially similar to

[22] Brown Shoe v. United States, *supra.*

[23] *Id.*

those used to determine the relevant product market . . . (citations omitted.) Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' (footnote omitted) of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." [24]

In the context of a § 7 Clayton Act case, the Supreme Court commented in United States v. Pabst Brewing Co., 384 U.S. 546, 549, 86 S.Ct. 1665, 1667-1668, 16 L.Ed.2d 765, that relevant geographic market need not be proven.

". . . in the same way the corpus delicti must be proved to establish a crime. . . . This phrase [any section of the country] does not call for the delineation of a 'section of the country' by metes and bounds as a surveyor would lay off a plot of ground."

The record establishes that almost all of the hockey players currently playing in the NHL, began their skating careers in either Canadian or United States amateur hockey. The typical players' journey to the "big league" carried them through at least one of the five semi-professional leagues which play throughout the United States and Canada. Further, the NHL and WHA have teams at the present solely in the United States and Canada. Against this factual background presented by the plaintiffs, the defendants urge that the plaintiffs have available a potentially large source of supply of European players. However, in order to be guilty of monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2, the WHA need not

[24] *See* 1 J. O. von Kalinowski, Anti-Trust Laws and Trade Regulation, § 8.02(2)(b), at 8-25 to 29, (1971).

prove that the NHL has an international monopoly in the hockey players' market. The language of the Sherman Act itself does not require a monopolization of *all* the trade or commerce, but rather *any* part of the trade or commerce among the several states or with foreign nations.

Applying the principles of *Brown Shoe* and *Pabst* to the facts of the instant case, I find that the relevant geographic market here is the United States and Canada.

V.

THE SHERMAN ACT—§ 1

In arguments and briefs before this Court, the WHA has vigorously taken the position that the practices of the NHL constitute *per se* anti-trust violations within the meaning of § 1 of the Sherman Act, 15 U.S.C. § 1.[25]

The WHA presents a not insubstantial case in support of its contentions that the totality of actions of the National Hockey League constitute a clear violation of § 1 of the Sherman Act.[26] The WHA's legal analysis of § 1 could

[25] § 1 of the Sherman Act provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

E. g. United States v. Topco Associates, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); Klor's v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); Fashion Originator's Guild v. F. T. C., 312 U.S. 457, 668, 61 S.Ct. 703, 85 L.Ed. 949 (1941); *see generally*, L. B. Schwartz, Free Enterprise and Economic Organization (1972), pp. 1-117.

[26] There are other § 1 Sherman Act cases decided in the context of the sporting arena. *Cf. e. g.*, Haywood v. National Basketball Ass'n, 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (1971) (Justice Douglas as Circuit Justice); Denver Rockets v. All-Pro Management, 325 F.Supp. 1049 (C.D.Cal. 1971); Deesen v. Professional

never be categorized as one which is clearly without merit. However, I find that because of the nature of the hockey sports industry, and the relative paucity of litigation on this type of reserve clause [27] that I should refrain from making a ruling at this preliminary injunction stage as to the § 1 Sherman Act isues.

> "At this stage of the proceedings the Court is governed by the familiar rule that a preliminary injunction should be viewed with caution and only granted in those clear cases where there is a substantial probability of eventual success. Thus, '. . . where difficult questions of law and fact are in dispute . . . it is established law of this District and Circuit that a preliminary injunction will not issue . . .' . . . Accordingly, it has been said that '. . . to doubt is to deny.'" Graham v. Triangle Publication, Inc., 233 F. Supp. 825, 829 (E.D.Pa.1964), aff'd, 344 F.2d 775 (3rd Cir. 1965.)

On the basis of the present record as to the § 1 issues, I have some doubts on the WHA's probability of ultimate

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Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966). *See generally*, J. O. von Kalinowski, Anti-Trust Law and Trade Regulation, §§ 50.01, et seq., at 50-1 to 26 (1971).

[27] At the final injunction stage, the NHL reserve clause has never been considered by a Federal Court. It has been considered in two preliminary injunction proceedings in which an NHL club sought enforcement of the NHL reserve clause to prevent a player from playing with a WHA team. Boston Professional Hockey Assn., Inc. v. Cheevers & Sanderson, 348 F.Supp. 261 (D.Mass. 1972), remanded, No. 72-1328 (1st Cir. Oct. 10, 1972); Nassau Sports, Ltd. v. Hampson, et al., No. 4-72-Civ. 466 (D.Minn Oct. 11, 1972). Judge Caffrey in Boston Professional Hockey Assn., *supra*, in denying the requested preliminary injunction noted: ". . . it would be unrealistic to rule that the Bruins have sustained their burden of showing that there is a possibility that this tangled web of legal instruments will not be found to restrain trade in professional hockey." It is thus necessary to reason by analogy to other sports cases. *Cf.* Flood v. Kuhn, 316 F.Supp. 271, 275-276, 282-284 (S.D. N.Y. 1970); *see* cases cited n. 28, *infra*.

success. The sports field is in some ways a hybrid, in that it is both similarly and dissimilarly affected by the normal economic variables governing business success. For a corporation producing aluminum, any entrant in the field is a competitor. From a traditional oligopolist's or monopolist's view, one might consider any new entrant as an adversary and thus undesirable. But by the nature of a sports contest, there must always be an adversary. By analogy, who would enjoy Vida Blue blazing strikes across home plate when the batter's box was empty, or Mark Spitz' triumphs, if he were the only one in the pool. Sports teams need competition, and if there are more than two teams, some type of league is probably desirable.

For maximum customer receptivity and profit it is in the best interest of any club that its opponents not generally be viewed by the public as totally incompetent and utterly unable to compete effectively. For if the latter occurs, thousands of customers will not spend their dollars for tickets to view hundreds of games when the contest seems to present no more of a challenge than an ant confronting an elephant. Thus, if it is not possible to keep the competitive challenge of all teams within some reasonable parameters, some type of intra-league reserve clause or system may be desirable and in fact necessary.

As one author has noted:

> ". . . (T)he anti-trust laws should not be interpreted to prevent the professional teams from making agreements necessary for the industry to function, even where the agreements come within categories labeled illegal *per se. However, recognition that player restraints of some sort are necessary and justified does not mean that all features of the present system should be held immune from anti-trust attack.* Indeed, where defenses are allowed for restraints which would otherwise be summarily condemned, it is appropriate for

> Courts to require not only convincing evidence that the restraint genuinely promotes the ends asserted to justify it, but also that these benefits could not be obtained by devices with less anti-competitive potential."[28] (emphasis added)

After extensive testimony from experts in football, basketball, and hockey, Judge Cooper concluded that some type of reserve system is desirable and essential for the maintenance of a baseball league. Flood v. Kuhn, 316 F.Supp. 271, 275-276, 282-284 (S.D.N.Y.1970). For these reasons and doubts, I refrain at this preliminary injunction stage, from making a finding as to whether the NHL's present reserve clause is a clear violation of § 1.[29] Yet I am not implying that after a full hearing for a final injunction that I would then hold that the present reserve clause is valid under § 1 of the Sherman Act. I merely hold *now* that I desire a fuller record before making judgment on the § 1 Sherman Act issue.

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[28] Note, The Super Bowl and the Sherman Act: Professional Team Sports and the Anti-Trust Laws, 81 Harv.L.Rev. 418, 422 (1967). *See* Jacobs & Winter, Antitrust Principles and Collective Bargaining: Of Superstars and Peonage, 81 Yale L.J. 1 (1971). *Cf.* Silver v. New York Stock Exchange, 373 U.S. 341, 348-349, 83 S.Ct. 1246, 1252, 10 L.Ed.2d 389 (1963); Note, Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason, 66 Columbia L.Rev. 1486 (1966). *Compare:* Deesen v. Professional Golfers' Association of America, 358 F.2d 165 (9th Cir. 1966) *with* Washington State Bowling Proprietors Ass'n., Inc. v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966) *and* Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049 (C.D.Cal. 1971).

[29] Of course, if an appellate court is free from doubt, there is a substantial record and findings as to the impact of the NHL reserve clause.

VI.

The Sherman Act—§ 2

While I have doubts as to whether the WHA will ultimately succeed on the § 1 grounds, and though I would deny a preliminary injunction if the only claim rested on § 1, I have *no* such doubts as to whether § 2 requires preliminary injunctive relief.

The WHA charges that the NHL has through a series of agreements and other concerted actions monopolized, conspired to monopolize, and attempted to monopolize major league professional hockey by (1) controlling the pool of players capable and available to play major league professional hockey, and (2) expanding the NHL so as to exclude the WHA from participation in major league professional hockey.

The analysis begins with § 2 of the Sherman Act, 15 U.S.C. § 2 which provides in relevant part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

The Supreme Court's most recent pronouncement precisely delineating the elements of a § 2 violation is United States v. Grinnell Corp., 384 U.S. 563, 570-571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966), where the Court stated the following:

> *"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a con-*

sequence of a superior product, business acumen, or historic accident." (Emphasis added.)

To determine whether the WHA has shown that the NHL falls within the test articulated in United States v. Grinnell, *supra,* one must first understand the history and impact of the reserve clause and the various arbitration agreements.

A. The Reserve Clause—Its History and Application

In Findings of Fact 77-111, *supra,* a concerted effort was made to outline objectively and accurately the precise details concerning the history of Clause 17 of the Standard Player's Contract, including (1) the nature and operative scope of the reserve clause prior to 1969 (when the negotiations pertaining to the arbitration of salary disputes were commenced); (2) the effect of any purported modifications to Clause 17 subsequent to 1969, viz., the addition of the Arbitration Agreements executed by the NHL and the NHL Players' Association on August 20, 1971, and March 29, 1972, and the inter-relationships of these agreements to the other provisions of the Standard Player's Contract; and (3) the extent of any collective bargaining on Clause 17 independent of the arbitration negotiations, more specifically, negotiations which modified the basic perpetual option of the reserve clause.

An examination of the record discloses that prior to 1969 the only mechanism existing for the resolution of salary disputes when the player and the respective NHL member team were unable to mutually agree, would be for the President of the NHL, Clarence Campbell, to serve as the final arbiter. [Finding of Fact 94, *supra*; attached Exhibit D-3, ¶¶ 17 and 18, in Exhibit D-1 (Campbell).] Prior to 1969, there were no contractual impediments whatsoever to the NHL club having and exercising a perpetual option over any player once he had been

drafted by a NHL team and had signed a Standard Player's Contract. It is unequivocally clear that, in view of the monopolistic power of the NHL, this arrangement would have violated Section 2 of the Sherman Act, since a player, for his entire professional career, would be contractually bound to play for the team which then held his contract.[30]

Prior to 1969, the operation of Clause 17 would have permitted the club to tender to the player a new contract every year, and that player would be required to sign, with any dispute over salary to be ultimately decided by the President of the NHL. Any dispute apart from salary would also be finally determined by the President of the NHL, as authorized by Clause 18 of that same Standard Player's Contract. It is therefore necessary to examine the events since 1969 to determine whether any subsequent, alleged modifications of Clause 17 have diluted its previously, fatally defective, anti-competitive effects.

The facts, as delineated in the Findings, *supra,* will not be repeated here, except only to clarify and emphasize some particular facts which I regard as significant and which are not readily obvious to the reader. An example of such a fact, as explicated in Findings 92-98, *supra,* is that although between 1969 and 1972 negotiations occurred on the issue of the arbitrability of salaries, it was not until June, 1972, that any of the Standard Player's Contracts formally reflected and incorporated the requirement that an independent arbitrator would conclusively decide salary disputes. Compare ¶ 17 of attached Exhibits D-3 (the 1969 Standard Player's Contract) and D-4 (the 1970 Standard Player's Contract) in Exhibit D-1 (Campbell), with ¶ 17 of attached Exhibit D-5 (the June, 1972, Standard Player's Contract). In 1969, as previously noted, the President of the NHL ultimately de-

[30] See pp. 509-513, *supra.*

cided salary. In 1970, the Standard Player's Contract stated salary was to be determined by mutual agreement.

Looking only to the language of the 1970 Standard Player's Contract, one can alternatively conclude that, rather than being mandatorily compelled to submit to arbitration, the President of the NHL, pursuant to ¶ 18, could decide salary, as in 1969.[31] Thus, with that construction, when one examines only those provisions which have been actually embodied in the 1970 Contract, and read ¶ 18 together with ¶ 17, then the 1970 Contract, in terms of its scope and indefinite duration, is precisely identical to the 1969 Contract in all material respects. If the existence of a mechanism to determine compensation is deemed to be legally dispositive as to whether there is a valid, enforceable contract, then such a scheme did, in fact, exist. The "right to renew" aspect of Clause 17, therefore, continued to operate in 1970 uncurbed and unrestrained and, consequently, was equally violative of Section 2 of the Sherman Act due to the same vitiating, anti-competitive results discussed above. While this fact will be reiterated below, the 1970 version of the Standard Player's Contract was the form utilized during the 1971-1972 playing season. [Finding 83, *supra.*]

To continue this chronology of events since 1969, one has to specifically focus on the two Arbitration Agreements executed between the NHL and the NHL Players' Association, and ascertain in what ways, if any, was the Standard Player's Contract altered or modified and thus arguably curing any anti-trust defect. More important, however, attention must be directed to the allocation of authority vested in the NHL Players' Association by the players.

Although some aspects of the labor relations history of the NHL and the NHL Players' Association were

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[31] See discussion of the effect of the 1971 and 1972 Arbitration Agreements, *infra*, at pages 507-509.

covered in the discussion concerning the applicability of the labor exemptions from the Sherman Act, the treatment there only highlighted some of the various collective bargaining sessions. It becomes essential then that this history be further clarified to the extent possible given the current record before me.

Initially, it should be stressed that the labor relations history between the NHL and the NHL Players' Association has often proceeded in a most informal fashion in terms of the failure to execute "formalized" agreements. As an example, Charles Mulcahy, the NHL owner-representative to the NHL Owner-Player Council, while discussing the method of operation of that Council, stated: "The history of hockey has been on a handshake basis, and if I tell you something, I am not going to go back on my word. . . ." [Exhibit D-125, p. 4-35.] It was his understanding that such oral agreements could be regarded as provisions of a player's contract even though unrecorded and not specifically ratified by any particular player. [Exhibit D-125, pp. 4-11 to 4-13; 4-21 to 4-22; 4-33 to 4-35.]

Mr. Alan Eagleson, Executive Director of the Players' Association, testified before the Senate Commerce Committee on June 28, 1972, that:

> "There is no formal collective bargaining agreement as such between the members of the Players' Association and the League. For purposes of direct discussion between players and owners, the format of our negotiations with the owners includes a Player-Owner Council." [Exhibit F, p. 481, attached to Exhibit D-1 (Campbell).]

Mr. Eagleson has further testified:

> "The aim of the [A]ssociation is to eventually extend that arbitration [of salary disputes] to include an

independent arbitration of all problems between players and owners. But it is a first step. And in this fashion we feel that it gives the club perhaps a little better advantage, but gives the players significant advantage over what—over the position he has previously been in. Because a player can still say, all right, that is the position of my association, and my association has agreed that the arbitration will be binding, but I may decide after having heard the decision on arbitration to say to hell with my association and the owners, I am not going to play for that kind of money.

"This happened, I think, only on one occasion, and it only lasted for a matter of a day and a half before we were able to express to the player that, look, fair ball is fair ball. As a result, things have gone rather smoothly in the past two years in this year." [Id. at p. 486.]

With such nebulousness, it is impossible to reconstruct the full context of the relationship of the parties and the binding effect, if any, of their agreements. Because of the informality of these discussions, some agreements have been finalized by a handshake, many of them have never been reduced to writing. Therefore, in view of this past cloudy collective bargaining history, the various parties may honestly reconstruct their "understanding" of these transactions differently.

In considering the impact the Arbitration Agreements have wrought upon the Standard Player's Contract, as well as examining the legal significance of any collective bargaining negotiations, I recognize that, at a minimum, one is always dealing with a quadripartite relationship:

(1) the National Hockey League (which presumably can speak for the owners);

(2) The NHL Players' Association (which purportedly speaks for the players *en masse*);

(3) A specific individual hockey player, who has his own specific contract with a single identifiable club; and

(4) A particular NHL team which has drafted certain players and negotiated individual contracts with each player.

Thus, the critical issue before me is whether any agreement reached by the National Hockey League Players' Association and the NHL teams is legally binding on an individual hockey player so that it modifies his currently existing contract to incorporate those new terms. I find that unless the individual player has specifically agreed to the amendment of his current contract, the March 29, 1972 Arbitration Agreement executed between the NHL and the NHL Players' Association is *not* legally binding on an individual player and, hence, does not modify his current contract.[32] Of course, a player may ratify the agreement of the Players' Association and the Club owners, but absent precise ratification, I find that any agreement between the Players' Association and the owners does not result in an automatic modification of a pre-existing, specific player's contract.[33] If one were to permit the Players' Association and the NHL to possess such

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[32] While I do not here separately discuss the effect the "temporary" August 20, 1971 Arbitration Agreement had on the then existing, individual Standard Player Contracts, I hold that this 1971 Agreement similarly did not automatically modify existing contracts unless there was explicit, individual player ratification of that Agreement. See the discussion appearing below regarding the effect of the March 29, 1972 Arbitration Agreement.

[33] It should be further noted that no NHL official has been able to refer to any *written* document which precisely states that an agreement (materially altering the terms of a contract) between the NHL and the NHLPA is automatically incorporated into an existing player contract.

power to amend an individual's current contract without the individual's express authorization or express ratification, one can imagine a player's one-year contract being extended for an indefinite period of time beyond the player's expressed original intent. An illustration of the dilemma confronting a player signing such a contract is appropriate. If it is assumed a player has signed a contract which, according to its express terms, has a duration of one year, were I to accept the NHL's contention that independent collective bargaining negotiations can modify existing player contracts, then that one-year contract has been extended for a minimum of an additional three years without the player's consent. As stated in Finding 100, *supra*, some of the NHL officials have recognized the possibility of the Players' Association and the NHL extending the 1972 Arbitration Agreement beyond the present 1975 expiration date.

Even if, *arguendo*, the 1972 Arbitration Agreement is automatically incorporated into an existing individual player's contract and is not solely a device for determining salary,[34] and even if the 1972 Arbitration Agreement expires in 1975 without having been extended by the NHL and the NHLPA (thus arguably making the reserve clause unenforceable after 1975 because no mechanism will then exist for determining the amount of compensation) I hold that in the circumstances of this case, the three year restraint following the expiration of a current contract[35] (considering this factor along with the other numerous

[34] Of course, I have found that the 1972 Arbitration Agreement (1) does not automatically modify a pre-existing, individual player's contract, and (2) is solely a device for determining salary. [Findings 85-87, 97.]

[35] By "current contract," I am referring to those individual player's contracts which have not been renegotiated and signed expressly incorporating the terms of the March 29, 1972 Arbitration Agreement.

interlocking agreements NHL has fashioned and shaped over the years to monopolize a hockey player's professional career) is unreasonable, and in violation of Section 2 of the Sherman Act.[36]

Finally, as delineated in Findings 104-111, *supra*, apart from the collective bargaining negotiations relative to the arbitration of salary, there have been no modifications of Clause 17 of the Standard Player's Contract which have altered or eliminated the basic perpetual option which the NHL has over any hockey player once he has first signed a Standard Player's Contract.

[36] I make this holding solely because of the present monopolistic power of the NHL, coupled with its intent to exercise that power as further described at pp. 509-513, *infra*.

As a practical matter, my holding that the 1972 Arbitration Agreement does not modify existing contracts, affects only those players whose contracts (1) were in effect on March 29, 1972 (when the Arbitration Agreement was executed); (2) were not specifically renewed or renegotiated by the individual player subsequent to March 29, 1972; and (3) according to the express terms of that existing contract, it would have expired on September 30, 1972, but for the existence and enforcement of the reserve clause. By reason of the NHL Standard Player's Contract as promulgated in June 1972, the aforementioned three year arbitration agreement has been included and incorporated by reference and, thus, any player who signed such a contract (commencing October 1, 1972) automatically adopts, ratifies and accepts the terms of the March 29, 1972 Arbitration Agreement. As stated in Findings 83, 89, 97, and 211, *supra*, all of the players who have signed contracts with the WHA had NHL contracts which expired on September 30, 1972, and these NHL contracts were neither renegotiated nor renewed.

I find it unnecessary in the context of a request for a preliminary injunction to decide either the validity or the enforceability of the 1972 Arbitration Agreement as it specifically affects those players who have renegotiated and signed in 1972 new NHL contracts containing the new arbitration terms. By my holding here, I do not mean to imply or intimate any view as to how that issue will ultimately be decided.

B. Monopoly Power

In view of the impact of the reserve clause, an additional issue for determination is whether the NHL possseses monopoly power in the relevant market.[37] In United States v. E. I. DuPont De Nemours & Co., *supra,* 351 U.S. at 391, 76 S.Ct. at 1005, the Court defined monopoly power as "... the power to control prices or exclude competition."[38]

Further, in American Tobacco Co. v. United States, 328 U.S. 781, 811, 66 S.Ct. 1125, 1139-1140, 90 L.Ed. 1575 (1946), the Court stated:

> "The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded *but that power exists to raise prices or to exclude competition when it is desired to do so.*" (Emphasis added)

Here, through the use, *inter alia,* of (1) Standard Players' Contracts, including the "reserve clause" in paragraph 17 of that contract, (2) the agreements between the NHL and three of the major semi-professional leagues, and (3) the agreements between the professional and semi-professional leagues and the amateur leagues, it is clear that the NHL overwhelmingly controls the supply of players who are capable and available for play in a new league where the level of internal competitions fairly approaches the levels currently existing in the NHL. In an attempt to minimize the NHL's extraordinary degree of control over the players, the NHL asserts that there are many other available players who will shortly be able to play major league professional hockey. However, the

[37] See pp. 500-502, *supra.*

[38] *Accord,* United States v. Grinnell Corp., *supra,* 384 U.S. at 571, 86 S.Ct. at 1704.

relevant market place is the market place of *today,* not the market place of 1980 or even the market place of 1975. A monopolist may not today excuse his present predatory practices because someday in the future his total domination of the market place may be lessened.

The NHL's monopoly power is their power to control overwhelmingly the supply of hockey players who are today available for play in any major professional league. It is that total control by the NHL which I hold is proscribed by § 2 of the Sherman Act. One who builds the most modern steel mill cannot operate without an adequate supply of iron ore. The 50,000 amateur hockey players allegedly available to the WHA are not the "iron ore" from which viable competition can be built.[39] If the WHA is to compete effectively for attendance and television rights with commensurate payments, the WHA must have a "show" which is equal or nearly equal to that of the NHL today. Since the WHA is a newcomer, the quality of play need not instantly equal that of the NHL, but there must be a prospect that the product will be nearly equal in a relatively short period of time.

Of course, I recognize that the NHL has neither prevented the birth of the infant WHA nor has the NHL caused the WHA to sustain a premature demise,[40] but monopoly power may be restrained before its full wrath is felt. *American Tobacco, supra.* The operation of the anti-trust laws need not be delayed until one is trying to almost resurrect the dead; these laws are designed to preserve living competitors. For all the above reasons, I find

[39] Despite this purported reservoir of "natural" material, in its 1972 Amateur draft, the NHL found only 45 players suited for its needs [Exhibit D-2 (Swados), at pp. 14-15, Finding 29, *supra*].

[40] The NHL stresses that only five suits have been filed to enforce the reserve clause. Here, however, success in any suit against any former NHL player would have a "chilling" effect on other NHL players contemplating playing in the WHA.

that the NHL possesses monopoly power in the relevant market as proscribed by *Grinnell, supra.*

C. Willfulness & Intent

The mere possession of monopoly power in the relevant market does not alone constitute a violation of section 2 of the Sherman Act. 15 U.S.C. Section 2.

There must also be

> "(2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell, 384 U.S. 563, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966).

The activities of the NHL go beyond mere possession of monopoly power in the relevant market to breach these aforementioned prohibitions articulated in United States v. Grinnell, *supra.*

The NHL has willfully acquired and maintained its monopoly power through the use of the many agreements detailed in Findings of Fact 35-89. Its continuing and overriding goal is to maintain a monopoly over the supply of major league professional hockey players.

The NHL employs devices such as reserve clauses, Standard Player Contracts, an NHL semi-professional league Joint-Affiliation Agreement, and control over the amateurs through the Pro-Am Agreement in which the amateurs agreed to recognize the NHL as the "sole and exclusive governing body of professional hockey".[42] If the NHL reserve clause were valid for those players whose contracts terminated[43] in September, 1972, then the NHL

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[41] See Findings 71-76, *supra.*

[42] See Findings 62-70, *supra.*

[43] See pp. 507-509, *supra,* for analysis of the category of contracts which are held here to violate the Sherman Act.

would have the power, directly or indirectly, to prevent any player under "contract" to the NHL or one of its affiliated minor professional leagues from playing with any other team or league outside the NHL System.

Upon reading the self-serving tributes for its expenditure of millions of dollars to develop amateur and minor league hockey, one might infer that the millions were spent solely for the honor and glory of amateur and minor league hockey. The NHL's motives were not quite so noble; these expenditures to develop the amateur and minor professional leagues were essential to maintain the NHL's monopolistic position.

In American Football League v. National Football League, 205 F.Supp. 60 (D.Md.1962), aff'd 323 F.2d 124 (4th Cir. 1963), the plaintiffs there alleged that the defendant, N.F.L., had monopoly power in three specific areas,—(1) cities, (2) players, and (3) the sale of television rights. Here, the WHA does not claim that the NHL has monopoly power to prevent the awarding of WHA franchises in a particular territory or restrict the availability of television contracts. The WHA does contend that the NHL has total and complete control over the supply of capable players. In A.F.L. v. N.F.L., supra, 205 F.Supp. 77, the Court noted:

> "In 1959 the NFL had most of the ablest players under contract. However, colleges graduate annually large numbers of talented players, and, because after the season starts professional football rosters are usually limited to around 35 players, many good players are released each year after the training season and are available to be signed by clubs in any league. Moreover, NFL players become free agents after a period of years."

In contrast to the above picture of relative openness and availability of players in professional football, the NHL

has a system which controls access to all professional and semi-professional players for at least three years. As my discussion, *supra,* concerning the reserve clause conclusively demonstrates, if the operation of the NHL's current reserve clause is not restrained, the NHL's control over the players is absolute for at least three years after the expiration of any current contract. Further, the value of the minor league professional hockey players as a source of supply to the major leagues is not the equivalent of college-level players in football. Moreover, the minor league professional hockey players are likewise bound by standard player contracts which contain reserve clauses materially identical to the NHL standard player contract. Finally, the general practice is that if a minor professional league player does not make the NHL team, nevertheless he is still bound by his former minor professional league contract and is thus *not* free to sign with another club or any other league. These differences between the football and hockey reserve systems are crucial.

Secondary evidence of the NHL's intent to maintain its control over professional hockey is its continuing policy of expansion tied to the increasing demand for hockey in the United States and also in Canada. Of course, if even this burgeoning interest in hockey in North America could nonetheless support only one supplier, then this court would be bound to conclude that the NHL enjoys a "natural monopoly". In Ovitron Corp. v. General Motors Corp., 295 F.Supp. 373, 378 (S.D.N.Y.1969), the Court noted "the natural monopolist is entitled to compete vigorously and fairly in a struggle for a market which *cannot support more than one supplier.*" (emphasis added)

In Hiland Dairy Co. v. Kroger Co., 402 F.2d 968, 976 (8th Cir. 1968), the Court commented:

> ". . . the only case condemning internal expansion is United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2 Cir. 1945). This case is unique as the Aluminum Company had a present monopoly of the market, of 90 per cent . . . and had kept increasing its capacity to anticipate future needs so as to discourage and eliminate competition".

I hold the rationale of United States v. Aluminum Co. of America, 148 F.2d 416, 431 (2d Cir. 1945), is so similar to the instant case that the *Alcoa* Case should be quoted at length:

> "The only question is whether it [Alcoa] falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement. It was not inevitable that it [Alcoa] should always anticipate increases in the demand for ingots and be prepared to supply them. Nothing compelled it [Alcoa] to keep doubling and redoubling its capacity before others entered the field. It [Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent."

Keeping in mind both the many agreements employed by the National Hockey League and its continuing expansion, it is apparent that the National Hockey League's intent is and was the willful acquisition and maintenance of a position as the only major professional hockey league

in the United States and Canada. Again, the language of United States v. Aluminum Company of America, *supra*, is particularly appropriate. In that case, Judge Hand continued, 148 F.2d at 432:

> "In order to fall with § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific,' intent makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing".

Here the NHL, like *Alcoa,* intended to keep, and did keep, a complete and exclusive hold upon the market of major league professional hockey players which the NHL acquired soon after its creation. The fact that the WHA is attempting to enter that market does not mitigate the instant WHA claims that the NHL currently enjoys monopoly power in the relevant market; for there is no evidence before me that under the present circumstances, the WHA will be an effective competitor.

The relevance of the *Alcoa* case to the expansion of an established professional sports league vis-a-vis a new entrant in the same professional sports field has been commented on by one author as follows:

> "Less clear, however, is the degree to which the older league may use its established position to compete vigorously against the new entrant when the result may be his destruction. Aluminum Co. of America v. United States (footnote omitted) may be read as holding that Alcoa's policy of expanding as fast as the market grew was illegal; Alcoa—as a monopoly—apparently had a duty to leave part of the demand unsupplied in order to encourage competitors. If this somewhat extreme interpretation of *Alcoa* were followed, an existing league would be required to refrain from expansion into new cities or from increasing TV coverage when such actions

> would preempt part of the market which the new league sought to enter.
>
> "*A strict application of the Alcoa principle might be particularly appropriate for professional sports.* Where many somewhat dubious restrictive practices will probably be tolerated within leagues because courts are reluctant to reject expert arguments that they are necessary for survival of the sport, *encouragement of new leagues may be the only effective way to produce the expansion of the industry needed to meet growing demand.*"[44] (Emphasis added.)

The expansion of the NHL during the WHA's formative period and the creation of the WHA itself are both responses to an increased market for the sport and thus increased economic attractiveness for those entering as well as those already in the field.

Here, I do not rely solely on the expansion of the NHL to show that it had the intent to monopolize; *for the President of the NHL, Clarence Campbell, has explained his league's intent as a determined drive to assure that the NHL is "the only major professional hockey league operating from coast to coast in the United States or Canada."* (Finding 122, *supra.*)

Expansion of the NHL was one factor indicative of the wrongful intent of the older league to totally monopolize hockey and remain the only major profesional hockey league operating within the United States, but expansion was only one of the several threads spun in the monopolistic fabric of the NHL to blanket players from entry to another league.

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[44] 81 Harv.L.Rev. 418, 431. The Court in AFL v. NFL, *supra,* declined to follow this approach that expansion is prohibited because he there found that the NFL could not expand quickly enough to exclude the AFL and that the NFL did not have pervasive control over available players enjoyed today by the NHL.

VII.

Preliminary Injunctive Relief

A. Standards for Adjudicating Preliminary Injunctive Relief

To warrant the preliminary injunctive relief requested pursuant to 15 U.S.C. § 26,[45] it is the plaintiff's burden to satisfy ". . . the four essential criteria:

(1) Irreparable harm to [applicants], absent such a stay;

(2) Absence of substantial harm to other interested parties;

(3) Absence of harm to the public interest; and

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[45] 15 U.S.C. § 26 provides in relevant part as follows:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: . . . ."

Here, the procedure under § 26 is governed by Rule 65 of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 65. The especially relevant portions of Rule 65 here are Rule 65(a) which mandates notice to the adverse party, Rule 65(c) which requires the posting of security by the applicant, Rule 65(d) which requires a court to state its reasons for the issuance of an injunction, and Rule 65(e) which provides that these rules ". . . do not modify any statute of the United States . . ." Further, the Advisory Committee's notes to Rule 65(e) expressly state that 15 U.S.C., § 26 is continued in full force. See generally, 7 J. Moore, Federal Practice, ¶ 65.01, at 65-13 (2d ed. 1972).

(4) A likelihood that [applicants] would prevail on the merits.

Winkleman v. New York Stock Exchange, 445 F.2d 786, 789 (3rd Cir. 1971).[46]

In the context of a complex anti-trust case, the Court of Appeals emphasized:

> ". . . preliminary relief is a serious remedy, (footnote omitted) and because application for such relief, particularly in a complex case, is often based on a record less comprehensive than that which a full adjudication would yield, the court has required that a plaintiff show a reasonable chance of ultimately prevailing on the merits. In an action by a private party, the plaintiff must also show that it will suffer irreparable injury unless relief is granted."[47]

Finally, it should be noted that a request for a preliminary injunction is also addressed to an ambit of discretion which must be carefully exercised by the district court.[48]

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[46] Other cases to the same effect are: Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 511 (3rd Cir. 1969); Nelson v. Miller, 373 F.2d 474, 477 (3rd Cir. 1967); Graham v. Triangle Publications, Inc., 344 F.2d 775 (3rd Cir. 1965), aff'g 233 F.Supp. 825, 829 (E.D.Pa.1969); Indus. Electronics Corp. v. Cline, 330 F.2d 480, 483 (3rd Cir. 1965); United States v. Ingersoll-Rand Co., 320 F.2d 509, 523 (3rd Cir. 1963); Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3rd Cir. 1962); Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, 268 F.2d 569, 573-574 (3rd Cir. 1959); and Sims v. Green, 161 F.2d 86 (3rd Cir. 1947).

[47] Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 511 (3rd Cir. 1969).

[48] Allis-Chalmers Mfg. Co., supra, 414 F.2d at 516; United States v. Ingersoll-Rand Co., *supra*, 320 F.2d at 523; Sims v. Green, *supra*, 161 F.2d at 89.

Additionally, in Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., *supra*, 414 F.2d at 510-511, the Court of Appeals for the Third Circuit in the context of a case involving a request for relief based on the anti-merger provisions of § 7 of the Clayton Act, 15 U.S.C. § 18, construed the injunction provision applicable here, § 16 of the Clayton Act, 15 U.S.C. § 26. The Court there held that a plaintiff's request for a preliminary injunction in an antitrust context is not subject to any special test; rather, the Court restated and applied the four requirements specifically noted above.[49]

In conclusion, the injunction sought under § 16 of the Clayton Act, 15 U.S.C. § 26 is not subject to any additional burdens over and above those generally governing the injunctive relief,—what is required is that a Court not make a premature resolution of complex issues, whose resolution is in doubt.

B. The Irreparable Harm Issue

Like most terms in the law, irreparable harm is a word of art. For total comprehension, one must understand the full mosaic. In some instances, the damage, though painful is retouchable, measurable, and correctible. At other times, the magnitude of the damage might be beyond repair; then, since the mosaic cannot be later restored to the original potential, its value will be lost, if not for generations to come, at least for the indefinite future. The differences between the purported ("irreparable") harms which will be sustained if the WHA loses here might very well be the

[49] Other cases holding that there are no special requirements for preliminary injunction under § 16 of the Clayton Act, 15 U.S.C. § 26 are: Teleflex Industrial Products, Inc. v. Brunswick Corp., 293 F.Supp. 106, 109 (E.D.Pa. 1968), modified, 294 F.Supp. 256 (E.D.Pa. 1968), vacated and remanded, 410 F.2d 380 (3rd Cir. 1969); N. W. Controls v. Outboard Marine Corp., 317 F.Supp. 698 (D.Del. 1970); Instant Delivery Corp. v. City Stores Co., 284 F.Supp. 941 (E.D.Pa. 1968).

loss of any place in the gallery of major league professional hockey competition. While in contrast, if the NHL sustains a loss by the preliminary injunction here being granted, the NHL will still have both prominence *and* first place in this gallery, and even when losing, the diminution of its relative stature will be almost minor—a mere shadow far more calculable in precise damages and above all clearly not a destruction of the NHL's manifest first-place position.[50]

Preliminary injunctions have often been granted against dominant companies to keep open the source of supply to their competitors because the dominant concern was breaching the antitrust laws in its refusals to deal with competitors. Cf. McKesson & Robbins, Inc. v. Charles Pfizer & Co., 235 F.Supp. 743 (E.D.Pa. 1964); Airfix Corp. of America v. Aurora Plastics Corp., 222 F.Supp. 703 (E.D.Pa. 1963); Bergen Drug Co. v. Parke Davis & Co., 307 F.2d 725 (3rd Cir. 1962). Here if the NHL is not restrained from enforcing its reserve clause, the WHA will not have available an effective source of major league professional hockey players.

In determining whether the parties are sustaining irreparable harm, I must view the evidence through a lens opened to the "pragmatic factual approach" and set on the "commercial realities" required by the antitrust laws.[51]

[50] As to the NHL "This is not a case of the claimed destruction of a business enterprise containing such speculative elements that they are not susceptible to ready ascertainment in damages." Graham v. Triangle Publications, Inc., 344 F.2d 775-776 (3rd Cir. 1965).

[51] Though the terms "pragmatic factual approach" and "commercial realities" were used in Brown Shoe v. United States, *supra*, and involved Section 7 of the Clayton Act, there is no reason to assume that pragmatic or commercial realities are not equally relevant to the Sherman Act.

1. The Superstar Syndrome

The commercial realities here start at the box office. If the WHA is going to be a competitor in professional major league hockey, in the public's eye it must have a contest on ice which is not too dissimilar to the NHL; for in this milieu of customer receptivity, some superstars are essential—i. e. names recognized as either superstars or at least players whose fame is more than persistent sub-mediocrity. If in its present embryonic stage the WHA does not have some superstars to nurture and sustain the public interest, it will not become a viable competitor to the NHL. Thus, the preclusion of name players who have either superstar status or at least significant acclaim will cause the WHA irreparable injury for years—for without them the public will not generate substantial enthusiasm for the WHA, and such lack of enthusiasm causes lethargy at the box office.

The WHA has taken a calculated risk in stretching its starting base to twelve teams. Having taken that calculated risk, my findings do not suggest that they should be entitled to stock all 12 teams with superstars. It is not a question of total parity between the leagues, but rather the probability of *no* parity if all of the superstars (whose contracts terminated on September 30, 1972) are precluded from joining the WHA by reason of the reserve clause.

Like other competitive sports, major league professional hockey is an interesting phenomena. The superstar syndrome does not mean that for success each team must have a Bobby Hull—even if one were rash enough to assume, *arguendo,* that there are several Bobby Hulls. However, to be competitive there must be some Bobby Hulls or some players of extraordinary credentials among some teams in the WHA. For the presence of such players benefits the entire league. One might be supportive of the WHA even though his own local club is bereft of superstars and he ob-

served only the stellar performers from other clubs vanquishing his home team.[52]

The owners of the WHA are no more philanthropic than the owners of the NHL clubs. The WHA recognized this commercial reality and the commercial necessity of the superstar when each WHA club agreed to pay a pro-rata share of the one million dollar bonus offered *and paid* to Bobby Hull for his acceptance of a contract with the Winnipeg Jets.

2. The Role of the Less Than Superstar

While the superstar may be the coveted hero of the crowds, he does not win the game by himself. He may draw the most applause but he wears only two skates and six men comprise the team. Thus, the reserve clause has implications far beyond the availability of superstars, for if the average players are not also available, the team cannot survive. Again, this commercial reality has been recognized by the WHA.

As we have noted in Finding 189, presently more than 200 of the 345 players signed to WHA were subject to reserve clauses in the 1971-72 contracts with the NHL, AHL, CHL and WHL.

The NHL emphasizes that it has filed only five suits and then only against "superstars". But its selective enforcement of the reserve clause against key individuals gives it no more standing than one who pursues selective price fixing for only a few products. If the NHL is permitted to selectively enforce the reserve clause against players whose contracts expired on September 30, 1972, then the WHA will always be under the Sword of Damocles. It will never know when one of its promising players will be legally

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[52] A case study in point might be the woes of the Philadelphia Eagles of the National Football League during the last several years.

beheaded from active WHA competition because the NHL has dropped the sword and enforced the reserve clause.

3. The Bond

I do not mean to imply that the NHL's loss of stellar stars is inconsequential or without damage—I am merely holding that it is not irreparable harm to the NHL. But because of the fact that I am mindful that it could cause some damage to the NHL if my ruling is wrong or is reversed by an appellate court, I am requiring a substantial bond of two and one half million dollars to be posted by the WHA as a condition precedent for the preliminary injunction's enforceability. Certainly, the WHA cannot complain of a bond in this amount when they are willing to pay a million dollars for even one player.

Rule 65(c) of the Federal Rules of Civil Procedure provides:

> "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an office or agency thereof." 28 U.S.C. Rule 65(c).

Professor Moore has commented:

> "The requirement of security is intended to protect the party restrained or enjoined, as the case may be, against 'costs and damages' incurred or suffered by the party wrongfully restrained or enjoined.
>
> "Bearing in mind the purpose of security, the amount of security is to be determined by the trial court in the exercise of sound discretion. Necessarily, if a restraining order is granted at the beginning of an action, the amount of security adequate for a defendant's protection is a matter of estimate in light of the circumstances of the case and the fact that the duration of the restraining order is limited in time; even at the preliminary injunction stage the amount remains an estimate; although at this point the development of the case and the Court's decision to grant a preliminary injunction probably make the estimate less conjectural, even though the preliminary injunction has no fixed time limit to run. (Footnotes omitted.)" [53]

The $2,500,000 bond which I require the WHA to post here is as precise a determination as I can make on the present record of the costs and damages which the NHL may suffer in the event it is determined that the injunction was improvidently issued. In Washington Capitol's Basketball Club, Inc. v. Barry, 304 F.Supp. 1193, 1203 (N.D.Cal.1969) the court required the plaintiffs to post a bond of $100,000.00 in a case contesting the status of only one basketball superstar, Rick Barry.

Here, the injunction restraining the NHL from enforcing or attempting to enforce its reserve clause is not a contest involving just one superstar. Rather, it is a dispute of a substantially larger magnitude. The superstars in issue are many,—Bobby Hull, Derek Sanderson, Gerry Cheevers, John McKenzie, to name just a few of the players whose former NHL clubs will be precluded from enjoying their services as a result of this injunction. However, the players directly affected include more than 200 players who but for the formation of the WHA and the issuance of this preliminary injunctive relief would

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[53] 7 J. W. Moore, Federal Practice, ¶ 65.09, pp. 65-94 to 95 (1972).

still be obligated to play with the NHL if the reserve clause is valid.

4. The Harm to the NHL

The NHL is no shaky institution which will collapse if it loses a few superstars or even many average players during the pendency of this preliminary injunction. The NHL is merely sustaining the fate which monopolists must face when they can no longer continue their prior total dominance of the market. For the reality of today is that the federal antitrust laws preclude the continued implementation of NHL President Campbell's fondest dream that it remains "the *only* major profesional hockey league operating from coast-to-coast in the United States [and] Canada".[54] (Emphasis added.)

Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter under Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15, 26) and 28 U.S.C. Section 1337.

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[54] See Finding of Fact 122, *supra*. As to the four criteria of Winkleman v. New York Stock Exchange, 455 F.2d 786, 789 (3rd Cir. 1971) and page 513, *supra*, the prior sections establish that (1) there would be irreparable harm to the WHA if preliminary injunctive relief were not granted, (2) that there is a relative absence of such substantial harm to the NHL. By my findings and conclusions of law that the NHL violates Section 2 of the Sherman Act it is clear that there is (3) "a likelihood that [the WHA] would prevail on the merits" on a final injunction hearing. As for the final factor in this four-tier test, it is indisputable that there is no "harm to the public interest" by granting the preliminary injunction. The public will have the advantage of seeing more players in more contests, and the elitism of the season ticket holders will be "checked" and more tickets will be available to that public which claims hockey is the game of the second half of the twentieth century.

2. The NHL and its member teams operate in interstate commerce and their actions described in the Findings of Fact affect interstate commerce within the meaning of the Sherman Act.

3. Professional hockey and professional major league hockey are subject to the anti-trust laws.

4. The part of commerce or "relevant market' upon which the conduct described in the Findings of Fact operates is professional major league hockey as it is currently played in the NHL. There exist sufficient disparities in the sale of tickets, hockey fan interest, and sale of broadcast rights to define a separate and distinct market in professional major league hockey as opposed to professional minor league or amateur hockey. The relevant geographic market is the United States and Canada.

5. The NHL and its member teams have combined *inter se* and with others through the NHL By-Laws and Constitution, the Joint Affiliation Agreement and the Pro-Amateur Agreement to establish and maintain the player reserve system embodied in Paragraph 17 of the Standard Player's Contract which perpetually[55] prevents any professional hockey player who has not signed a new 1972-73 Standard Player's Contract with either the NHL or the minor professional leagues (and who has not renegotiated a new 1971-1972 contract expressly incorporating the terms of the March 29, 1972 Arbitration Agreement) from freely negotiating for his services, not only within the NHL but also outside that league.

6. Even if the player reserve system embodied in Paragraph 17 of the Standard Player's Contract is held to be not a perpetual option, but instead is merely a prohibition for three years precluding any player (whose contract has expired on September 30, 1972, who has not renego-

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[55] See discussion appearing at pages 504-513, *supra*.

tiated a new 1971-1972 contract expressly incorporating the terms of the March 29, 1972 Arbitration Agreement, and who has not signed a new 1972-1973 Standard Player's Contract) from freely negotiating for his services not only within the NHL but also outside that league, such three year restraint following the expiration of a current contract is unreasonable.[56]

7. Insofar as the aforementioned reserve clause operates to exclude the WHA and its member teams from entering the field of major league professional hockey through the player restraints, it is a violation of Section 2 of the Sherman Act. At this preliminary injunction stage, the Court does not decide whether the NHL's agreements constitute *per se* violations of § 1 of the Sherman Act.

8. There is a clear and susbtantial likelihood that at trial, the interlocking agreements among the NHL teams, the reserve clause in the Standard Player's Contract, and the agreements between the NHL and the minor and amateur hockey organiaztions will be found to have given the NHL the power of a monopoly in violation of § 2 of the Sherman Act. Such monopoly power is demonstrated by the NHL's ability to control the supply of professional hockey players, thus precluding effective competition. NHL has exercised such monopoly power in the relevant market.

9. Conduct by the NHL which tends to eliminate competition between actual and/or potential competitors is actionable by players who have been or who are likely to be injured thereby.

10. There is a similar likelihood that, because the NHL and its member teams have consciously entered into the foregoing agreements and have consciously maintained the

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[56] See discussion appearing at pages 504-513, *supra*.

reserve clause in the Standard Player's Contract for at least 20 years, they have consciously acquired and maintained monopoly power and that such power was not the consequence of superior product, business acumen, or historic accident.

11. Evidence as to the NHL's intent to monopolize has been shown in their maintenance of the reserve clause and the By-Laws and agreements hereinbefore described. The agreements eliminate competition by excluding non-NHL teams from access to the supply of potential and established professional caliber players, the services of whom are vital to the establishment of a major professional hockey league.

12. The NHL may not assert, by way of affirmative defense, the narrow exemption from the antitrust laws created for labor organizations under §§ 6 and 20 of the Clayton Act.

13. The NHL has not shown that the illegality of the reserve clause is excused or immunized by reason of any collective bargaining agreement between the NHL and the National Hockey League Players' Association. The NHL has not shown that they have bargained with the Players' Association concerning the reserve clause, or that the 1972 Arbitration Agreement entered into by the NHL and the Players' Association modifies any preexisting individual Standard Player's Contracts.

14. The WHA and its member teams have demonstrated that they will be immediately irreparably injured by the enforcement of the reserve clause in that they will be deprived of the services of professional caliber players vital to the existence of a major professional league.

15. The former NHL players who have contracted with the WHA for the 1972-73 playing season have demonstrated immediate, irreparable and noncompensable harm to their careers and reputations as major league profes-

sional hockey players and/or coaches if no injunctive relief is granted.

16. The balance of hardship absent injunctive relief clearly favors those former NHL players who have contracted with the WHA for the 1972-73 playing season, over the injury which might be sustained by their former NHL clubs.

17. The issuance of a preliminary injunction will maintain the *status quo* until a final adjudication of the merits.

18. Any Finding of Fact which should also be deemed a Conclusion of Law is incorporated herein by reference.

19. For the foregoing reasons, the Preliminary Injunction should be granted.

PRELIMINARY INJUNCTION AND ORDER

And now, this 8th day of November, 1972, upon consideration of the depositions, affidavits and documentary evidence submitted by the parties to the Court and because of the Findings of Fact and Conclusions of Law filed in the attached Opinion, it is hereby ordered that the National Hockey League, its member clubs and teams,[57] and those acting on its behalf, are preliminarily

[57] On procedural grounds Atlanta Hockey, Inc. and Nassau Sports, a Limited Partnership, owners of NHL teams in Georgia and New York were dismissed from CA 72-1661, see n. 14, *supra*. Thus, as to C.A. 72-1661, this Order is not applicable to those two parties. There is a question of fact as to whether Atlanta and Nassau are actually parties of record in Civil Action 72-1906 (transferred on September 26, 1972 from the United States District Court for the Northern District of Illinois) and Civil Action No. 72-1995 (transferred on October 11, 1972 from the United States District Court for the Central District of California). However, they remain as named defendants in C.A. 72-1906 and counter-defendants in C.A. 72-1807. I reserve my ruling on the issue as to whether this Order is applicable to Atlanta and Nassau because of their membership in NHL and their status in C.A. 72-1906, 72-1995 and 72-1807.

enjoined from further prosecuting, commencing, or threatening to commence any legal proceeding pursuant to and/or to enforce the so-called "reserve clause" (presently Paragraph 17) of the National Hockey League Standard Player's Contract, against any player, coach or other person whose contract, but for the reserve clause, expired on or before November 8, 1972.[58]

Wherefore, the motions of the World Hockey Association, its member clubs and teams, and John McKenzie, for preliminary injunction are hereby granted.

This Order shall become effective upon the posting by the World Hockey Association of a bond of two and one half million dollars ($2,500,000.00) with surety approved by the Clerk of this Court.

UNITED STATES DISTRICT COURT,
E. D. PENNSYLVANIA.

Feb. 26, 1974.

Civ. A. Nos. 72-1661, 72-1807, 72-1902, 72-1906, 72-1995, 73-19, 73-74, 73-215, 73-218, 73-358, 73-2484, 74-127 and 74-161 to 74-163. M.D.L. No. 119.

In re PROFESSIONAL HOCKEY ANTITRUST LITIGATION (MULTIDISTRICT LITIGATION)

Leonard W. Wagman and Michael C. Silberberg of Golenbock & Barell, New York City, Perry S. Bechtle, Alan M. Lerner, Barry F. Greenberg of Cohen, Shapiro, Polisher, Shiekman & Cohen, Philadelphia, Pa., for Metropolitan Hockey Club, Inc. and Golden Blades Hockey, Inc.

[58] For the category of persons to whom this Order is applicable, *see* n. 36, *supra*.

Harold E. Kohn, Allen D. Black, David H. Weinstein, Arthur B. Makadon, of Harold E. Kohn, P.A., Philadelphia, Pa., for Harold E. Kohn, Harold E. Kohn, P.A., and World Hockey Assn.

HIGGINBOTHAM, District Judge.

Opinion

I.

INTRODUCTION

This opinion constitutes the most recent chapter to an increasing number of directives and rulings issued by the Court—some *sua sponte*—over the past couple of weeks. These declarations heretofore were not prescribed to indulge any whims of the Court but unfortunately were necessitated by the numerous motions filed with the Court on a regular basis by the remaining parties to this antitrust litigation.

The instant matter pertains to the motion of Metropolitan Hockey Club, Inc. ("Metropolitan") and Golden Blades Hockey, Inc. ("Golden Blades") of the World Hockey Association ("WHA") to compel Harold E. Kohn, Esquire, and his firm, Harold E. Kohn, P.A., to produce for inspection and copying by Metropolitan and Golden Blades all legal papers and documents served by or upon Kohn and his firm prior to the settlement of portions of this litigation. Exclusive of Metropolitan and Golden Blades, the other member clubs of the WHA have executed a Consent Decree with the member clubs of the National Hockey League ("NHL"), said Consent Decree being approved by the Court on February 19, 1974.

Incident to the resolution of the aforementioned motion is the determination of the validity of an attorney's lien asserted by Kohn and his firm on all the papers falling within that category and now in their possession. Metro-

politan and Golden Blades contend, *inter alia*, that Kohn had been retained by WHA as lead counsel to prosecute this litigation and consequently the status of Metropolitan and Golden Blades as members of WHA entitles them to copies of all legal documents in Kohn's possession. Consistent with that position, Metropolitan and Golden Blades insist that they are not required to pay Kohn any monies for inspection and receipt of said materials, except the nominal costs for reproduction and duplication.

For reasons which are hereinafter set forth, the Court concludes that Harold E. Kohn and his firm do have a legitimate general or retaining attorney's lien which attaches to all papers relating to and arising out of this litigation and now under their control. *Before* such documents are to be released, Metropolitan and Golden Blades must satisfy the full amount of the lien established by the Court as due and owing to Kohn or otherwise post adequate security to ensure adequate surety indemnification in the event of their subsequent noncompliance.

II.

FINDINGS OF FACT

On the basis of the facts which are not in dispute, taking into consideration the WHA Requests for Admissions and the answers thereto, the memoranda of Golden Blades and Metropolitan in support of their motion, documents filed in opposition to said motion, and the various responses submitted in compliance with Pretrial Orders Nos. 14, 15 and 17, the Court makes the following findings of fact:

A. METROPOLITAN HOCKEY CLUB, INC.

1. In the early part of 1972, Metropolitan acquired a franchise to operate a team of the WHA within 100 miles of New York City Hall.

2. Metropolitan was one of the original twelve clubs assigned franchises in the newly created WHA.

3. After paying only two player payrolls in the fall of 1972, Metropolitan failed to pay its financial obligations, including players' payroll.

4. The WHA then stepped in and paid that payroll and the other expenses of the team until some time prior to May 11, 1973.

5. An agreement between Metropolitan and WHA was entered into on November 16, 1972, wherein Metropolitan agreed to pass a corporate resolution empowering the WHA's designee to be named operating manager of Metropolitan.

6. (a) Metropolitan and WHA intended jointly to seek a new owner for the team.

(b) Under the agreement between WHA and Metropolitan dated November 16, 1972, it was agreed that any and all sums to continue day-to-day operations of Metropolitan were to be reimbursed out of the proceeds of the sale of the assets and franchise of Metropolitan.

7. Messrs. Ralf Brent, Lawrence Stern and Lee Matison were willing to acquire a WHA franchise in the New York metropolitan area.

8. Messrs. Brent, Stern and Matison entered into an agreement with the WHA dated April 11, 1973 and Raiders Hockey, Inc., now Golden Blades, entered into an agreement with Metropolitan dated March 26, 1973 in respect of the acquisition of the assets and certain liabilities of Metropolitan.

9. The unpaid Metropolitan obligations included about $270,000 in unpaid withholding taxes.

10. The purchase price recited in the agreement of April 11, 1973 between Messrs. Brent, Stern and Matison

and WHA is $1,500,000. In addition, Raiders Hockey, Inc. was required by WHA to acquire all of the assets of Metropolitan, which acquisition was consummated at a purchase price of 200,000 shares of Golden Blades Common Stock.

B. Golden Blades Hockey, Inc.

11. By agreement dated March 26, 1973, Raiders Hockey, Inc., now Golden Blades, acquired all of the assets and certain liabilities of Metropolitan.

12. On May 11, 1973, Messrs. Brent, Stern and Matison fulfilled all of the terms of their agreement of April 11, 1973 with WHA except that they requested additional time to arrange for the issuance of a $500,000 promissory note. WHA agreed to this request and on May 14, 1973, the sum of $500,000 was paid WHA in cash in lieu of the issuance of said promissory note.

13. Raiders Hockey, Inc., a Delaware corporation, had been formed prior to the closing with WHA. Subsequently, that corporation's name was changed to Golden Blades Hockey, Inc. Messrs. Brent, Stern and Matison assigned all of their rights under the WHA agreement to Golden Blades and a franchise was subsequently issued by the WHA to Golden Blades.

14. Metropolitan owns 200,000 of the 1,040,000 outstanding shares of Golden Blades Common Stock.

15. On November 8, 1972, this Court in Phila. World Hockey Club v. Philadelphia Hockey Club, 351 F.Supp. 462 (E.D.Pa.1972) granted a preliminary injunction to the WHA effective upon posting a $2.5 million bond.

16. The WHA Litigation Report of October 11, 1973, states in part:

"Preliminary Injunction Bond

"The last, and perhaps most important part of this report, concerns the preliminary injunction bond posted in the Philadelphia action. As you will know, that bond is in the amount of $2,500,000. At present it is supported by nine (9) letters of credit, each for $250,000, delivered by each of the following nine (9) WHA Members:

"1. Chicago Cougars Hockey Club,

"2. Edmonton World Hockey Enterprises Ltd.

"3. Professional Hockey Corp. (Los Angeles)

"4. Midwest Saints, Inc. (Minnesota)

"5. New England Professional Hockey, Inc.

"6. Le Club De Hockey Les Nordiques, Inc.

"7. Sports Centrepoint Enterprises, Ltd. (Winnepeg)

"8. Ontario Nationals Hockey Teams, Inc. (Ottawa)

"9. Philadelphia World Hockey Club, Inc. (Blazers)

"Obviously, two of the entities posting bonds (Philadelphia and Ottawa), will no longer desire to participate. Although they are parties to the litigation and, in the best interests of all, have decided not to withdraw, it is appropriate that their letters of credit not be renewed, and new letters be posted by Vancouver and Toronto. It would also seem appropriate that the new WHA Member Franchises become parties in this litigation, as their interests are just as much at stake as those already involved as parties.

"During the first week of November, many of these letters of credit begin to expire and the bonding company has recently written us demanding that the *full* amount of collateral ($2,500,000) be posted with them, in the form of letters of credit no later than November 1, 1973. The form of letter of credit requested by the bonding company is that recently issued by the Los Angeles Sharks, a copy of which is enclosed for your reference.

"Twelve WHA clubs are now playing hockey and each of them is receiving the daily benefit of the existence of the preliminary injunction. Consequently, it appears that the appropriate method of supporting the new bond which will be issued in early November would be to divide twelve into $2,500,000 and have each club post a letter of credit for approximately $210,000. Obviously, this will require some readjustment. In addition, the bonding company will not accommodate us at all this year and, it is an absolute requirement that the collateral be posted on time, or the bond will be revoked. I am sure that all counsel will agree with me and the WHA Legal Committee that this would be a disastrous result, causing us to lose all credibility in the pending Philadelphia actions."

17. The Court makes no finding as to whether Golden Blades as a condition precedent to participation in this anti-trust litigation was required to submit a letter of credit in the amount of $250,000 or $210,000.

18. Paragraph 4.4 of the April 11, 1973 Agreement provides:

> "In the event that the Members [Messrs. Brent, Stern and Matison] fail to pay the Purchase Price at the Closing [May 11, 1973] or to make other arrangements satisfactory to WHA in respect thereof, this Agreement shall terminate, in which event the Advance [$100,000] shall be retained by WHA as liquidated damages and the rights of the parties hereto

shall be governed by the provisions of Paragraph 10 below".

19. Golden Blades never paid the $270,000 for Metropolitan's withholding taxes which it assumed pursuant to Paragraph 4.2.3(iii) of the April 11, 1973 Agreement.

20. Paragraph 6 of the Agreement of April 11, 1973 states:

> "The Purchase Price payable hereunder is inclusive of all obligations in respect of assessments, expenses, penalties, and the like, payable by WHA members prior to date hereof, it being the intent hereof that the Franchise hereby granted to the Members is free and clear of all such obligations to WHA. With respect to future assessments against WHA members from and after the date hereof, the Members will be obligated therefor with the exception of any assessments so made in respect of obligations incurred by WHA in its operation of the Raiders from and after November 15, 1972."

21. Paragraphs 10 through 10.3 of the April 11, 1973 Agreement provide:

> "10. In the event that the Closing does not occur because of default by the Members under any of the provisions hereof or pursuant to such other arrangements as shall be made by the parties hereto.
>
> "10.1 the Franchise and Interest in Properties shall be delivered by the Escrow Agents to WHA;
>
> "10.2 all funds being held in the Trust Account shall be delivered to WHA; and
>
> "10.3 all contracts, including but not limited to players contracts, entered into by the Members on behalf of the Raiders shall be assigned to WHA.

22. Paragraph 11 of the April 11, 1973 Agreement stipulates:

> "The payment assumed by the Members pursuant to Paragraph 4.2.3 and Exhibit E of this Agreement shall be deemed to be assessments of the WHA pursuant to the WHA By-Laws and a default in payment thereof shall be deemed a default in payment of a WHA assessment."

23. Golden Blades and Metropolitan were advised that gate receipts were a principal source for financing general operations of WHA administration, including the antitrust litigation, and that prior to the acquisition by Golden Blades of its franchise, the WHA had levied substantial special assessments upon the WHA member teams as the principal source of financing and antitrust litigation.

24. (a) During the 1973-74 season, the WHA gate assessment is a minimum of $62,500 per team per season or 6%, whichever is greater.

(b) This assessment is paid at the rate of $1600 per game with an adjustment at the end of the season.

25. At no time has either Metropolitan or Golden Blades ever paid a gate receipt assessment to the WHA.

26. When the 1973-74 season commenced in the Fall, Golden Blades sold between $340,000 and $400,000 in season tickets but receipts from such sales were on a delayed billing basis and some have never been collected.

27. After October 18, 1973, WHA announced that it was paying the players of Golden Blades.

28. The WHA has advised Golden Blades that as of mid-November 1973, it paid an excess of $275,000 of league funds to creditors of Golden Blades.

29. (a) The Chemical Bank is a creditor of the Golden Blades and its principals.

(b) WHA has advised the Golden Blades that Chemical Bank has asserted a claim of $440,000 plus interest against WHA.

30. Golden Blades has been advised that certain season ticket holders are making claims against WHA in an amount exceeding $340,000.

III.

Discussion

Harold E. Kohn, Esquire, and his firm, Harold E. Kohn, P.A., now assert the existence of a general or retaining attorney's lien on all the legal papers and documents in their possession which pertain to or affect the instant antitrust litigation. The recognition of the availability of such a lien is not a phenomenon of recent vintage since this form of security device had its origin at common law and the Courts traditionally have soundly exercised their equitable powers in order to effectuate the underlying considerations of balancing and protecting the interests of both the attorney and his client.

As early as 1871 the United States Supreme Court acknowledged the unique status of the attorney's lien as a means of fully satisfying the financial obligations owed to an attorney by a client due to services rendered which inured to the benefit of the client. To secure payment of fees incurred and other related disbursements, the attorney could retain all papers belonging to the client. In re Paschal, 77 U.S. (10 Wall.) 483, 493-497, 19 L.Ed. 992, 996-997 (1871). This concept was reaffirmed in principle in McPherson v. Cox, 96 U.S. 404, 417-418, 24 L.Ed. 746, 750-751 (1878).

In Smyth v. Fidelity & Deposit Co. of Maryland, 125 Pa. Super. 597, 190 A. 398, aff'd. per curiam 326 Pa. 391, 192 A. 640 (1937), a Pennsylvania court articulated some of the

guidelines regarding the general or retaining attorney's lien as distinguished from the charging lien. The Court there stated:

> " 'The retaining lien may be defined as the right of an attorney at law to retain possession of such documents, money, or other property of his client coming into his hands by virtue of the professional relationship, until he has been paid for his services, or until he voluntarily surrenders possession of the property, with or without payment.' " 190 A. at 401.

In further clarifying the character of the lien, the Court noted:

> " '[The retaining lien] is a mere right of the attorney to retain the papers, etc., of his client in his possession until his claim is satisfied; it confers no further rights, and is valuable to the attorney in proportion to the extent that such retention by him will embarrass the client, that is to say, he cannot sell said papers, under process to foreclose his lien, as may a pledgee or a mortgagee in other cases, but his lien extends only to the right to retain such papers until his debt is paid. * * *' " 190 A. at 401.

Generally, other jurisdictions have been in accord with the foregoing teachings. See, *e.g.*, Lyman v. Campbell, 87 U.S.App.D.C. 44, 182 F.2d 700, 701-702 (1950); In re San Juan Gold, Inc., 96 F.2d 60 (2d Cir. 1938); The Flush, 277 F. 25 (2d Cir. 1921), cert. denied, 257 U.S. 657, 42 S.Ct. 184, 66 L.Ed. 421 (1921); Borup v. National Airlines, 159 F.Supp. 808, 810 (S.D.N.Y.1958); Steiner v. Stein, 141 N.J.Eq. 478, 58 A.2d 102 (1948); Norrell v. Chasan, 125 N.J.Eq. 230, 4 A.2d 88 (1939). *Cf.* Jaslow v. United States, 308 F.Supp. 1164, 1165-1166 (E.D.N.Y.1970) and Schwartz v. Broadcast Music, 130 F.Supp. 956, 958-959 (S.D.N.Y. 1955). In a related context the ABA Code of Professional

Responsibility, Ethical Consideration 5-7 and Disciplinary Rule 5-103(A)(1) promulgated thereunder expressly allow for such a lien. The latter rule notes that an attorney may "[a]cquire a lien granted by law to secure his fee or expenses." *Cf.* Disciplinary Rule 9-102(B)(4).

The dispute between Harold Kohn and Metropolitan and Golden Blades acquires an additional dimension because of the controverted relationship as to whom Kohn represents. On the one hand, Metropolitan and Golden Blades argue that Kohn, as lead counsel for the WHA since January 1973, represents Metropolitan and Golden Blades since they are member clubs of the WHA. On the other hand the principal officers and stockholders of Metropolitan and Golden Blades, Messrs. Richard I. Wood and Seymour E. Siegel, testified at their depositions that they had never retained Harold E. Kohn, P.A., on behalf of Metropolitan and Golden Blades to prosecute their claims in this litigation but instead had earlier retained the law firm of Paul, Weiss, Goldberg, Rifkind, Wharton and Garrison prior to switching to their current counsel. Depositions of Richard I. Wood and Seymour E. Siegel, February 16, 1974 at 30, 34-40, 82-83.

Metropolitan and Golden Blades beseech the Court to do what is equitable yet these two parties flatly refuse to acknowledge any obligations on their parts in return. The findings of fact previously recited clearly indicate that neither Metropolitan nor Golden Blades has financially borne its portions of the costly litigation expenses incurred by Harold Kohn and WHA to date. The WHA was required to assume the financial liabilities of Metropolitan as early as November 1972. Metropolitan did not pay its percentage of the gate assessments, its pro-rata share of the counsel fees or post its letter of credit in the amount of $250,000 to secure the $2.5 million preliminary injunction bond ordered by this Court on November 8, 1972.

Counsel for Golden Blades places considerable emphasis on paragraph 6 of the April 11, 1973 Agreement in that this section purportedly absolves Golden Blades from any additional assessments by WHA or other liabilities of Metropolitan which were outstanding prior to April 11th, 1973. Yet even the terms of the April 11th Agreement, which Golden Blades counsel contends relieve it of further financial demands as to past Metropolitan debts, have not been performed. Paragraph 6 of the April 11th Agreement in any event does not operate as a bar against Golden Blades being subject to additional assessments by WHA after April 11, 1973. In fact, that paragraph expressly recognizes this contingency:

> "... With respect to future assessments against WHA members from and after the date hereof [April 11, 1973], the Members will be obligated therefor with the exception of any assessments so made in respect of obligations incurred by WHA in its operation of the Raiders from and after November 15, 1972."

A number of the affidavits and other memoranda tendered to the Court in behalf of Kohn and WHA suggest that in addition to the conditions spelled out in the April 11th Agreement Golden Blades was required to post a letter of credit in the amount of $210,000 to secure the preliminary injunction bond in this case. Since this assertion was vigorously denied by Golden Blades, I specifically make no finding as to whether as a condition precedent to the Golden Blades' participating in this litigation or being a beneficiary in any way it was required to post said letter of credit.

Kohn and the WHA are entitled to be compensated for the reasonable value of the services rendered by them until the date of the approval of the Consent Decree in this action, February 19, 1974. On a *quantum meruit* basis, Metropolitan and Golden Blades should be compelled to reimburse Kohn and WHA for their labors. Massive numbers of documents have been accumulated by the parties

over the course of this complex antitrust litigation at considerable expense to WHA and Kohn. Depositions, for instance, were taken not only throughout the United States but in several cities in Canada as well.

Courts from time to time are invoked to determine the extent of an award of reasonable counsel fees on a *quantum meruit* basis. See, *e.g.*, Tranberg v. Tranberg, 456 F.2d 173, 175 (3rd Cir. 1972); Borup v. National Airlines, 159 F.Supp. 808, 810 (S.D.N.Y.1958). While it is true that the case at bar is not a class action, it does involve multiple parties and therefore the recent opinion of the Third Circuit in Lindy Bros. Bldrs., Inc. of Phila. v. American R. & S. Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973), could immeasurably illuminate this subject.

In *Lindy Bros.*, 487 F.2d at 165, Chief Judge Seitz commented:

> "The award of fees under the equitable fund doctrine is analogous to an action in quantum meruit: the individual seeking compensation has, by his actions benefited another and seeks payment for the value of the service performed. Understood in this way, there are two possible 'causes of action' that may be urged as the basis for award of attorneys' fees. One of these 'causes' belongs to the plaintiff who brought the underlying suit. His claim is that by instituting the suit he has performed a service benefiting other class members. The reasonable value of that service is measured by the expenses incurred by the plaintiffs on behalf of the class."
>
> * * * * * * *
>
> "The second 'cause of action' for award of attorneys' fees under the equitable fund doctrine belongs to the attorney. The attorney's claim is that his conduct of the suit conferred a benefit on all the class members, that one or more class members has agreed by contract to pay for the benefit the attorney conferred upon him, and that the remaining class members should pay what the court determines to be the reasonable value of the services benefiting them."

The Court elaborated on the criteria lower court judges should apply in arriving at the amount of the attorneys' fees in cases of this type. The Court advised that one should consider (1) the number of hours spent by the attorneys in prosecution of the case and in what manner which attorneys spent those hours; (2) the value of the services to the parties measured in part by the Court's own assessment, the normal hourly billing rate, and the attorney's legal reputation and status; (3) the contingent nature of the litigation; (4) "the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of recovery obtained." *Id.* at 168.

I recognize that Kohn and the other members of the WHA exclusive of Metropolitan and Golden Blades have already settled their litigation with the NHL. For the time period of January, 1973 to December 31, 1973, Kohn, as lead counsel for WHA, asserts that the WHA has incurred legal expenses of $988,776.00. By letters dated February 25, 1974 to the Court, Kohn's firm has advised the Court that from April 1, 1973 to December 31, 1974 Harold E. Kohn, P.A., and WHA have costs amounting to $580,164.59 plus an additional $22,655.41 for disbursements and legal services rendered by Harold E. Kohn, P.A., in January, 1974.

As I view the applicable law, in order to receive the papers sought, Metropolitan and Golden Blades could be obligated to pay the total legal fees and related costs expended by the WHA in pursuing this antitrust litigation from its initiation to the hour of settlement. These figures as previously noted, could approximate one million dollars. However, since the general attorney's lien is partially

addressed to the Court's equitable powers, I would grant Golden Blades and Metropolitan the rights to have all of the papers in question immediately if they pay one-twelfth* of all counsel fees and related costs pertaining to this antitrust litigation from April 11, 1973 to the date of the Consent Decree, February 19, 1974. On the basis of the documentation filed to date the lien would be one-twelfth of approximately $602,820.00.

In making this ruling I am *not* holding the Harold E. Kohn, P.A., and WHA are not ultimately entitled to more than the one-twelfth sum, *supra*. In fact, I hold the contrary; ultimately WHA and Harold E. Kohn, P.A., may be entitled to the entire sum approximating one million dollars. Furthermore, if Golden Blades and Metropolitan receive any verdict from the defendants, before payment of the verdict to Metropolitan, Golden Blades, or their present counsel, the issue of the lien and the amount which is owed to WHA and Kohn's firm for their past legal services will be reopened and adjudicated.

While there has been some documentation as to attorneys' fees, I will give to Metropolitan and Golden Blades the opportunity to conduct an evidentiary hearing this week in order that WHA and Kohn can provide with specificity the precise breakdown of the one million dollar figure which they claim they have paid or become obligated to pay. I am mindful of Chief Judge Seitz' perceptive comments in *Lindy Bros, supra,* and intend to adhere strictly to them.

Though this opinion is filed prior to having the total figures of WHA's counsel fees fully documented, the opinion is written so that Golden Blades and Metropolitan can

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* When the litigation was commenced in August, 1972 there were twelve clubs in the WHA. For the lien purposes I have concluded that the equitable obligation of Metropolitan and Golden Blades should be one-twelfth, treating Metropolitan and Golden Blades as a single entity.

ascertain the rationale of the Court's thinking on this lien issue. If they desire to pursue the evidentiary hearing they may, with a full recognition of the formula which will be applied as a condition precedent to the release of the papers sought. This opinion is further filed so that if Golden Blades and Metropolitan are not financially prepared to satisfy the lien or post the surety indemnification bond required, they will be able to file their proposed schedule for finishing discovery and filing a final pretrial order and other pretrial memoranda.

Finally, I am aware that in the cases of Jaslow v. United States, *supra,* 308 F.Supp. at 1165, and Schwartz v. Broadcast Music, *supra,* 130 F.Supp. at 958, the Courts there adopted a slightly different approach with regard to resolution of the lien issue. In *Schwartz,* the Court reserved determining the amount of the attorney's lien or requiring payment thereof until the conclusion of the trial since a portion of the attorney's claimed compensation was contingent upon the amount of the recovery, a figure which could not be accurately ascertained before the end of the litigation. In *Jaslow, supra,* the Court, which was also dealing with a contingent fee arrangement, noted that the attorney's lien could be satisfied out of any subsequent recovery and reserved against that recovery rather than requiring an immediate cash payment by the client once the attorney's services had been discharged. Significantly, the amount of the attorney's lien in question was only $1,950.00.

In view of the precarious financial position of Metropolitan and Golden Blades and the non-contingent character of the controversy herein raised, the Court will not defer deciding the entire lien question until the termination of litigation which will be lengthy and extremely costly to the parties remaining. This procedure comports with that approach utilized by the Second Circuit in In re San Juan Gold, Inc., *supra,* 96 F.2d at 60-61, where it held:

". . . As explained in The Flush, supra, the right to retain the papers is valuable to the attorney in proportion as denial of access to them causes inconvenience to the client. *Where the client or some one representing him has a pressing necessity for them, the court will order them delivered up upon condition that the fee be paid or security given for such sum as may be found to be due.* In the case at bar the trustee argues that the debtor has insufficient funds either to pay or to provide security for the appellant's fee. The record contains no evidence that the debtor is without funds, *but however this may be, the fact is immaterial. Nor it is material that the debtor's reorganization proceedings may be thwarted*, if access to the papers is denied. The attorney's lien cannot be disregarded merely because the pressure it is supposed to exert becomes effective. Cf. Davis v. Davis, 90 F. 791, C.C. Mass. If it is worth anyone's while to have the 77B proceedings continue and the papers are essential to that end, *the necessary funds to obtain their release may be forthcoming; if not, the debtor and its trustee must do without them* (Emphasis added).

Thus, for all the foregoing reasons Harold E. Kohn and Harold E. Kohn, P.A., will not be compelled to release any legal papers until the attorney's lien in the amount previously stated has been satisfied or adequate surety indemnification is otherwise provided.

Federal Rules of Civil Procedure

RULE 37.

FAILURE TO MAKE DISCOVERY; SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable exenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in

which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36 (a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Subpoena of Person in Foreign Country. A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(f) Expenses Against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.
As amended Dec. 29, 1948, eff. Oct. 20, 1949; March 30, 1970, eff. July 1, 1970.

Supreme Court, U. S.
FILED
MAY 27 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1558

NATIONAL HOCKEY LEAGUE, et al.,

Petitioners,

v.

METROPOLITAN HOCKEY CLUB, INC.,
and GOLDEN BLADES HOCKEY, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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NATIONAL HOCKEY LEAGUE, et al.,
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METROPOLITAN HOCKEY CLUB, INC.,
and GOLDEN BLADES HOCKEY, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Metropolitan Hockey Club, Inc. and Golden Blades Hockey, Inc. respectfully oppose the petition for certiorari filed by the National Hockey League and its member teams to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Counter-Statement of the Questions Presented

1. Should petitioners' request for the issuance of a writ of certiorari be granted where the Third Circuit in reversing the District Court's imposition of the drastic sanction of dismissal under Rule 37 *F.R. Civ. Pro:*

> (a) Held that under this Court's controlling decision in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), the dismissal sanction could only be imposed for "willful, conscious and intentional" non-compliance with the orders of the District Court;

(b) Determined that the dismissal of the action was an abuse of discretion since, among other things, there was "insufficient evidence" to support any finding by the District Court that the conduct upon which the dismissal was predicated, i.e., the inadvertent failure to timely supplement the answers to 56 of 1,150 interrogatories, was "willful, conscious and intentional" within the meaning of *Societe;*

(c) Carefully considered the entire record before the District Court and detailed the many "extenuating factors" which militated against dismissal;

(d) Carefully sought to distinguish between the conduct of respondents and their former counsel who had become adversaries during the course of the litigation;

(e) Concluded that respondents' counsel had "worked frantically to complete all discovery within the deadlines set by the Court" and had exercised "enormous effort after they took control of the case in attempting to complete discovery matters within a brief period;" and

(f) Concluded that under the circumstances of this case the sanction of dismissal was inappropriate and that the District Court had failed to adequately consider the imposition of lesser sanctions?

2. Should this Court exercise its discretion to grant a writ of certiorari where petitioners have failed to demonstrate that (a) the decision of the Third Circuit is in conflict with the applicable decisions of this Court or of the other circuit courts of appeals; (b) that the Third Circuit has decided an important question of federal law which has not been but should be, settled by this Court; or (c) that the Third Circuit so departed from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision?

Counter-Statement of the Case

A. Introduction

The decision sought to be reviewed was rendered by the United States Court of Appeals for the Third Circuit on February 23, 1976. The decision reversed an order of the United States District Court for the Eastern District of Pennsylvania (Higginbotham, J.) entered in five consolidated antitrust actions on July 3, 1974. The District Court order had granted petitioners' motion to impose the most drastic sanction provided under Rule 37 *F.R. Civ. Pro*—dismissal with prejudice.

The basis for the dismissal order, which the District Court characterized as the "ultimate supreme penalty" (App. E, p. 22a)[1] was respondents' unintended and inadvertent failure to timely file supplemental answers to 56 of 1,150 interrogatories—interrogatories to which they had previously filed 180 pages of answers and supplemental answers (R. 2231-2350, 2558-2610).[2] The dismissal culminated a five month period subsequent to the decision by respondents not to participate in a settlement negotiated between the World Hockey Association ("WHA") and the National Hockey League ("NHL") and to pursue their antitrust claims with separate counsel. The Third Circuit in its opinion reversing the dismissal order noted that in this five month period, respondents' new counsel had exercised an "enormous effort" and had "worked frantically to complete discovery within the deadlines set by the Court" in the face of an "onerous burden" of prosecuting the massive and complex litigation without access to the files maintained by former WHA counsel (App. A, pp. 14a, 16a).

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[1] "App." reference is to the Appendix to the Petition for Certiorari.

[2] "R" references are to the pages of the Joint Appendix in the Court of Appeals. "RA" references are to the Record on Appeal.

Upon a "thorough review of the record" the Third Circuit concluded that the dismissal constituted an "abuse of discretion" by the District Court and that the "sanction of dismissal was improper under the circumstances of this case" (App. A, pp. 5a, 17a). The Court of Appeals stated:

> "After carefully reviewing the record, we conclude that there is insufficient evidence to support a finding that [respondents'] failure to file supplemental answers by June 14, 1974 was in flagrant bad faith, willful or intentional. We believe that under all of the circumstances the extreme sanction of dismissal was unwarranted. Extenuating factors were present. [Respondents'] counsel exercised an enormous effort after they took control of the case in attempting to complete the discovery matters within a brief period" (App. A, p. 16a).

The Third Circuit's decision, we believe, is only the second reported instance in which that Court has reversed an order of dismissal under Rule 37(d) since this Court's decision in *Societe Internationale* v. *Rogers*[3]—a reversal which, we submit, was necessitated by the unique facts of the case. The opinion of the Circuit Court makes clear that the controlling standard of *Societe* was scrupulously followed and as discussed below, the decision is in complete accord with those of the other circuit courts of appeals.

B. Background of the Litigation

The actions below were part of a complex of antitrust litigations between the fledgling WHA and the older, established NHL. Fifteen separate law suits between the

[3] 357 U.S. 197 (1958). The first, and we believe the only other instance in which the Third Circuit has reversed an order of dismissal under Rule 37(d) was in *First National Bank of Washington* v. *Langley-Howard, Inc.*, 381 F.2d 207 (3rd Cir. 1968).

two leagues and their member clubs were consolidated in the Eastern District of Pennsylvania in October, 1972 by the Judicial Panel for Multi-District Litigation pursuant to 28 USC §§ 1404(a) and 1407(a). The main action between the two leagues, *World Hockey Association* v. *National Hockey League*, CA72-1995, included as a party-plaintiff, respondent Metropolitan Hockey Club, Inc. ("Metropolitan"), a corporation which owned and operated the WHA's New York franchise known as the "New York Raiders." The WHA parties in these actions were represented by lead counsel, Harold Kohn, a well known and highly experienced antitrust lawyer.

As a result of what the WHA contended was a "preemptive expansion" by the NHL and other predatory practices (R. 106-117), Metropolitan experienced immediate financial difficulties and the WHA in November 1972 took over operation of the New York franchise for the balance of the WHA's initial season (R. 1995, 2147, 2898). On May 14, 1973, respondent Golden Blades Hockey, Inc. ("Golden Blades") a newly-organized Delaware corporation, acquired the assets of Metropolitan (R. 2086, 2898-99).[4] Golden Blades experienced similar financial difficulties and on November 20, 1973 the WHA announced

[4] In an apparent effort to buttress their argument under *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962) the petitioners suggest that the law firm of Golenbock and Barell was so involved in the affairs of Golden Blades, that "it would seem pointless to try to distinguish between attorney and client" (Petition p. 7, fn. 4). In this respect they have, to say the least, taken liberties with the facts. Thus, for example, they state that the corporation was "newly organized by Golenbock and Barell, a New York law firm" and that a "block of Golden Blades stock went to Golenbock and Barell" (Petition p. 4). The new corporation, however, was "organized" by its incorporators and officers Ralf Brent, Lee Matison and Lawrence Stern, businessmen who had no connection with Golenbock and Barell except as clients (R. 2238). The "block" of stock was a mere 30,000 shares out of a total issued of 1,040,000 for which the firm paid $3,000 (R. 2507, 1789).

that it had revoked its franchise and moved the team to Cherry Hill, New Jersey (R. 1793-4).

C. The February 19, 1974 Settlement between the NHL and WHA

Settlement negotiations between the WHA and NHL to settle the antitrust actions had continued periodically since the spring of 1973. These negotiations were intensified after the November revocation of the Golden Blades franchise and resulted in a settlement of all actions on February 19, 1974 (R. 1271, 1452-1520). Metropolitan and Golden Blades (collectively "M-GB") were not advised of the settlement discussions by lead counsel Mr. Kohn and in fact, first learned of the existence of the discussions and a "tentative agreement" as a result of a *New York Times* article on January 15, 1974 (R. 1271, 1293). M-GB's general counsel, the New York firm of Golenbock and Barell thereupon requested the opportunity to review Mr. Kohn's files in order to evaluate M-GB's posture in the litigation and the settlement (R. 1293-4). Mr. Kohn refused to make the files available to them on the ground that M-GB and the WHA had, as a result of the termination of M-GB's franchise, been placed in an adversary position (R. 1204).[5] Golenbock and Barell then filed a separate appearance on behalf of M-GB in the Philadelphia actions in February 1974 (R. 1272-74).

The February 19, 1974 settlement terminated the litigations as to all WHA parties except M-GB. The settlement provided *inter alia* for payment by the NHL to the WHA of $1,750,000 in counsel fees and the playing of 15 exhibition games between teams of the two leagues. Significantly, the settlement included a provision by which the WHA

[5] In fact, in February 1974, the WHA commenced an action against Golden Blades in Supreme Court, New York County entitled *World Hockey Association* v. *Golden Blades Hockey, Inc., Ralf Brent, Lee Matison, Lawrence Stern, et al.*

agreed to indemnify the NHL up to $1,750,000 for any liability to M-GB as a result of the litigation (R. 1452-1520).

D. The Pretrial Proceedings Subsequent to the Settlement

On February 20, 1974, the day after entry of the consent decree, Golenbock and Barell, now in charge of the litigation for M-GB met with counsel to the NHL and the Court to discuss the future course of the litigation. At this conference, the Court apprised the parties that the March 18, 1974 trial date would be adhered to, and that all parties should do whatever was necessary so that the trial would commence on the announced date. In this respect the Court admonished all counsel to work "no less than six full days" and perhaps "seven days a week" (R. 1550).

(1) *Denial of Access to Lead Counsel's Files*

At the February 20th conference, M-GB's new counsel sought the Court's assistance in gaining access to files held by Mr. Kohn including copies of the pleadings, motions and documents produced in the litigation by Metropolitan during the time of its operation by the WHA so as to enable it to prepare for trial (R. 1550). Mr. Kohn had claimed a lien on the file for the entire amount of legal fees and costs rendered to the WHA in the amount of $1 million and refused to release the files to M-GB until he was paid (R. 1523-24).

Golenbock and Barell was required to work the next six days, including the intervening weekend to prepare and respond to cross-motions addressed to Mr. Kohn's claimed lien (R. 3014-16). At a pretrial conference on February 26, 1974, the Court entered an order recognizing a lien in favor of Mr. Kohn and his firm on "all papers relating to and arising out of this litigation and now under their control" (App. G, p. 167a). The order also required M-GB to post sufficient surety to satisfy in excess of $50,000 of the lien, holding that it "could be obligated to pay the total legal fees and related costs expended by the WHA . . .

[which] could approximate $1 million" (App. G, pp. 179a-180a).[6]

As noted by the Third Circuit, in its subsequent opinion, the effect of the order was to leave M-GB without copies of pleadings, orders and other crucial discovery documents with only five weeks remaining prior to the commencement of a complex antitrust trial against the well-financed and better prepared NHL who had intimate knowledge of the facts and procedural history of the actions—a situation characterized by the Third Circuit as an "onerous burden" (App. A, p. 14a).

(2) *Petitioners' Interrogatories*

On February 26, 1974 the Court requested the parties to agree on a pretrial schedule consistent with the April trial date (R. 1924). Counsel for M-GB at this time agreed to the demand of the NHL counsel that they answer the NHL's interrogatories in two weeks by March 11, 1974 (R. 1925). These interrogatories (R. 590-704) had been previously served in the spring of 1973 in the actions then pending in the Eastern District of Pennsylvania and answers served by Mr. Kohn on behalf of the WHA and its member teams (R. 817-1071, 1082-86) had been deemed by the NHL to be inadequate. The interrogatories had been one of the subjects of negotiations between the NHL and WHA attorneys which at the instance of the Court had been directed to a host of outstanding discovery motions during the eight month period between June 1973 and the February 1974 settlement (R. 1218, 1251-52).[7] No

[6] The District Court at this time also considered M-GB's motion for a continuance of the March 18th trial date but granted only a brief adjournment to April 1st or April 8th (R. 1924, 1930).

[7] These motions included: (i) WHA plaintiffs' motion to compel answers to interrogatories (RA. 142); (ii) NHL defendants'

(*footnote continued on following page*)

resolution of these matters had ever been reached and by a series of court approved stipulations, the parties had periodically postponed the deadline for completion of discovery to well beyond the initial date which the Court had set for trial of the actions (R. 1214, 1227).[8]

At the time of their commitment to answer the interrogatories by March 11th, M-GB's new counsel had not seen or had an opportunity to review the 114 page set of interrogatories with multiple parts aggregating 1,150 questions nor was it aware that the Court would compel them to defend simultaneous depositions of every officer, director, and major shareholder of M-GB, some occurring in separate cities, during the period February 27 to March 11, 1974 (R. 2152).[9] When the Court directed M-GB to prepare and defend simultaneous depositions on February 27,

(*footnote continued from preceding page*)

motion to compel answers to defendants' first set of interrogatories (R. 792); (iii) NHL defendants' motion to compel production of documents (RA. 173); (iv) WHA plaintiffs' motion to compel production of documents (R. 1147); (v) NHL defendants' motion to compel supplemental answers to interrogatories (R. 1115) and (vi) WHA plaintiffs' motion to compel admissions (RA. 191).

[8] Petitioners' assertion that the discovery disputes had been "resolved" by June 25, 1973 (Petition, p. 8) is contradicted by the record including their own motion to extend the discovery deadline filed on September 28, 1973 (R. 1216-26) and their submission to the Court of "unresolved" matters on February 5, 1974 (R. 1251-54).

[9] Petitioners continue to argue as they did to the Third Circuit, that M-GB's counsel Mr. Wagman had seen the interrogatories prior to February 26, 1974 and had in fact represented in open court that he had read them and had the information to answer them (Petition, pp. 8, 15). Petitioners' argument in this respect exceeds the bounds of legitimate advocacy. Indeed, the entire matter was clarified at the March 14, 1974 argument of petitioners' initial motion to dismiss when Mr. Wagman pointed out to the Court that he had made no such "representation" on February 22, 1974, and in fact, had not seen the interrogatories, whether or not a copy had previously been furnished to his firm by Mr. Kohn in 1973 (R. 2201-04).

1974, M-GB's counsel strenuously protested, pleading that "I will never be able to answer [the interrogatories] by March 11th, if I have to do that, and it is not fair, and it isn't due process" (R. 1965).

(3) PETITIONERS' ~~Respondents'~~ *March 13, 1974 Motion to Dismiss*

As common sense would dictate, M-GB was simply unable to answer the interrogatories by March 11th. On that day, M-GB's counsel hand-delivered a letter to the Court requesting a one week extension of time to complete their answers to the interrogatories, pointing out that M-GB had been involved on a day-to-day basis in defending the simultaneous depositions in the previous two weeks.[10] Counsel also advised the Court that because he had not had an opportunity to review the interrogatories prior to the February 26, 1974 pretrial conference he had not realized that the interrogatories required detailed expositions of plaintiffs' legal theories and contentions involving analysis of thousands of documents from M-GB's files which had been produced on February 28th and 29th (R. 2151-52).[11]

On March 13, 1974, prior to any action on M-GB's request, the NHL moved to dismiss the case based upon M-GB's failure to answer the interrogatories (R. 2172). A hearing was held the following day and the Court denied the defendants' motion to dismiss giving M-GB until March 18th to supply answers to the interrogatories (R. 2225, 2228).

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[10] A chart which graphically depicts this arduous deposition schedule is reproduced in the Joint Appendix at R. 2962-63.

[11] Here it is significant that in July, 1973 with a trial date then scheduled to commence in four months, the NHL had sought a protective order against similar interrogatories served by the WHA stating that it needed not less than 30 days to file objections and 90 days to answer. The NHL protested that the answers would require "a great deal of work" (RA. 211).

(4) *Respondents' Answers to Petitioners' Interrogatories*

M-GB timely submitted 120 typewritten pages of answers to the interrogatories on March 18th (R. 2231-2350), answers which were far more comprehensive than those previously filed by any WHA plaintiff under former lead counsel Mr. Kohn.[12] At a pretrial conference the following day, March 19th, the NHL informed the Court that it intended to file a motion to compel supplementary answers (R. 2351). At the same conference, the Court advised the parties that the trial date was to be adjourned to September 16, 1974. The Court observed that since M-GB was "insolvent" and since there was a risk of mistrial occurring if the trial extended into the summer months, there was no longer any reason to place the litigants under "extraordinary pressures" as it had previously done (R. 2353-54).

(5) *The April 15 Order and the Filing of Supplemental Answers to Petitioners' Interrogatories*

On March 21, 1974, the NHL filed its motion to compel supplementary answers to certain of the interrogatories (R. 2362). This motion, among other things, sought to compel additional answers to questions concerning financial records of Metropolitan, the location of which had been the subject of extensive deposition testimony. This testimony had revealed that these financial records were in the possession of third parties such as attorneys and accountants who had asserted retaining liens over them (R. 1990-2049). The motion also requested supplemental answers to 56 of the 1,150 interrogatories involving computation of damages. These "damage" interrogatories sought to require M-GB to compartmentalize their damages and to attribute specific dollar amounts to particular acts of defend-

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[12] This fact has never been disputed by petitioners; we urge the Court to compare M-GB's answers (R. 2231-50) with the answers filed by Mr. Kohn in May, 1973 (R. 817-1071).

ants alleged in the complaint to have been in furtherance of the conspiracy to monopolize such as, for example, "blacklisting" (R. 619-20) and the issuance of disparaging statements about the WHA (R. 621-22). M-GB was given only one and one-half days to respond to the motion (R. 2977). The motion was argued on March 25, 1974 (R. 2398) and a decision compelling supplemental answers was filed by the Court on April 15, 1974 (R. 2483).

The Court's April 15th order set forth six "guidelines" and three "deadlines" for providing supplemental answers. A substantial number of the answers were to be filed by April 29, 1974. Other interrogatories which M-GB claimed they could not answer because of inadequate discovery were to be answered no later than July 25, 1974. Answers to a third category of interrogatories, the 56 dealing with M-GB's damage claims, were to be supplemented by June 14, 1974.

The April 15th order was hardly a model of clarity and caused confusion to all parties. Thus, as a result of the fact that the June 14th "deadline" for answering the 56 "damage" interrogatories appeared separate and apart from the other "guideline" dates and was confusingly juxtaposed with the July 25th date (compare pp. 1, 2 and 7 of the order at R. 2483-84 and 2488-89) the June 14th date was inadvertently omitted from pretrial schedules prepared by the managing clerk in the office of M-GB's counsel (R. 2982, 3008-09). The petitioners' attorneys also misinterpreted the order believing that the June 14th date was not limited to the 56 "damage" interrogatories, but rather, was applicable to a broad series of additional interrogatories concerning M-GB's "financial structure, financial dealings and other aspects of their financial opertions" (R. 2744).[13]

[13] Thus, defendants later argued that the June 14th deadline was imposed so as to give M-GB an opportunity to "retrieve its

(*footnote continued on following page*)

On April 24, 1974, M-GB sought an extension of the April 29th deadline because the District Court clerk's office, under the press of other Court business, was unable to timely reproduce several hundred documents from the Court files which M-GB required in connection with the preparation of supplemental answers (R. 2503, 2985).[14] The Court extended the deadline to May 6, 1974 (R. 2532). M-GB timely filed 60 pages of supplemental answers on May 6, 1974 (R. 2558-2609). Included in these supplemental answers were answers to several of the "damage" interrogatories (R. 2982).

(*footnote continued from preceding page*)

financial records" from the various entities who had possession of them and "to give defendants a fair opportunity to study M-GB's answers and financial documents and take additional depositions . . . concerning these financial matters prior to the close of the period for depositions. . . ." (R. 2743, 2827-30). This contention was rejected by the District Court in its July 3, 1974 dismissal order.

[14] Petitioners suggest that M-GB was derelict in that "it waited until April 17, 1974 before ordering the clerk to reproduce the hundreds of documents it said it needed to satisfy its discovery obligations", observing that M-GB was able to obtain other documents from the Court file "in time" for use in their "case in chief" (Petition, p. 11, fn. 10). Petitioners neglect, however, to reveal that subsequent to the February 26th order denying M-GB access to Mr. Kohn's files, M-GB had unsuccessfully attempted to arrange with the Court for reproduction of documents contained in the massive Court file by a method which would have eliminated dependence upon the clerk's xerox facilities and at a cost appreciably below the Court's established xerox charge of $.50 a page (R. 2136). When this request was denied (R. 2154) M-GB's attorneys spent many days reviewing the massive files so as to reduce the potentially enormous cost of copying at the Court established price (R. 2983-85). Petitioners also neglect to reveal that the documents reproduced by M-GB in connection with their "case in chief" consisted of several exhibits to depositions (see appendix to brief of defendants-appellees' below)—hardly comparable to the expense of reproducing the "hundreds of documents" necessary to comply with the Court's April 15th discovery order (App. E, p. 38a).

(6) Respondents' Inadvertent Failure to File Supplemental Answers to the 56 "Damage" Interrogatories on June 14, 1974

As a result of the omission of the June 14th date from their calendar of dates and deadlines, M-GB failed to file supplemental answers to the 56 "damage" interrogatories on June 14th. As noted by the Third Circuit in its opinion (App. A, p. 9a), M-GB's counsel for the six weeks prior to June 14, 1974 had been involved on a day-by-day basis in taking over 3,500 pages of depositions (R. 2986-89) in addition to preparing and arguing the responses to numerous motions filed by defendants for protective orders and working on many other aspects of this litigation (R. 2558-2726).[15]

On June 14, 1974, at the close of oral argument on cross-motions by both sides to compel responses to requests for admissions and of defendants' motion for various protective orders, defendants' counsel announced that they would be filing a motion to dismiss. When M-GB's counsel asked the basis of the motion, they were advised only that it was "for refusal to make discovery" (R. 2993). The next day, Saturday, June 15, 1974, upon their return to New York City, M-GB's counsel reviewed its files and pending motions in discovery proceedings and discovered the omission of the June 14th deadline from their calendar prepared by the firm's managing clerk (R. 2993). On Monday, June 17th, the next business day, M-GB's counsel hand-delivered a letter to defendants' local counsel requesting an extension of the June 14th date and suggesting that the time for the supplemental answers to the "damage" interrogatories be extended to July 25, 1974, the same date that supplemental answers to other interrogatories were due. The letter

[15] For a chronological summary of all of M-GB's pretrial activities, see R. 3011-70.

stated that if this were not acceptable, that defendants suggest an alternative date that would be satisfactory to them (R. 2730, 2994). The following day, June 18, 1974, defendants' counsel advised that they would not agree to an extension and confirmed that the failure to supplement the interrogatory answers on June 14th was the basis of the motion they intended to file (R. 2730, 2994). M-GB thereupon immediately filed a motion to extend their time to answer the 56 "damage" interrogatories to July 25, 1974 (R. 2727).[16]

Subsequent to the filing of a motion for an extension, the NHL on June 19, 1974 filed its motion to dismiss (R. 2732). M-GB was given only 48 hours to Saturday, June 22, 1974 to submit opposing papers (R. 2994-95). When M-GB protested this palpably insufficient period, the time was extended but only until Monday, June 24, 1974 (R. 2774). The motions were argued on June 26, 1974 (R. 2839) at which time M-GB's counsel in answer to the Court's question explained that the answers had not been filed due to an inadvertent "targeting" of the wrong date:

> "Mr. Wagman [M-GB counsel]: Because we felt that we had to the extent that we had information available to us, we had supplemented those answers in May, and that by July 25th we were going to answer all the remaining supplemental—give the court and our adversaries all the remaining supplemental answers.

[16] Petitioners suggest that receipt of the supplemental answers on July 25th would have been after termination of discovery and would have deprived the "defendants of any opportunity to question M-GB about the information produced" (Petition, p. 11). In fact, the information defendants claimed they needed for further discovery was the financial records in possession of third parties (R. 2743, 2827-30). The Court in its April 15th order did not require answers concerning these records until July 25th, after the close of discovery (R. 2488, 2489 and App. E, p. 37a, fn. 7). In any event the Court could have postponed the time for discovery until after July 25th, without disturbing the September trial date.

That was the deadline date we had targeted, July 25th to supplement any answers we hadn't supplemented in May'' (R. 2878) [Emphasis supplied].

Mr. Wagman further emphasized to the Court that having devoted substantial time and effort to the case, M-GB's counsel would not knowingly or willfully have disregarded the deadline (R. 2880-81).

E. The District Court's July 3, 1974 Order of Dismissal

On July 3, 1974, the District Court granted Petitioners' motion and dismissed each of the five pending actions with prejudice under Rule 37(b)(2)(C) and (d):

(1) The Court found that the respondents' failure to file supplemental answers on June 14th and their failure to meet the prior "deadlines" of March 11th and April 29th was "willful noncompliance" with "the Court's critical orders" (App. E, p. 22a). It characterized the failure to timely meet these deadlines as evidencing a "callous disregard of responsibilities . . . owe[d] to the Court and to their opponents'' (App. E, p. 50a);

(2) The Court completely ignored respondents' efforts to obtain an extension from petitioners during the period June 15th to June 18th and in fact, suggested that M-GB had "compounded [their] noncompliance by waiting until five days afterwards before they filed any motions." The Court characterized this "noncompliance" as "flagrant bad faith" (App. E, pp. 50a-51a);

(3) The Court also stressed that the interrogatories had remained substantially unanswered for "seventeen months" (App. E, p. 50a). In this respect, the Court's opinion paraphrased whole sections of defendants' brief which charged M-GB with an array of so-called "defaults'' purportedly committed prior to February, 1974 when the

actions were being handled by Mr. Kohn.[17] The Court ignored the fact that from June 7, 1973 to the date of settlement, the parties were negotiating at the Court's request in order to resolve a host of discovery matters including the question of whether and to what extent the WHA parties would be required to file supplemental answers to interrogatories.

F. The Third Circuit's Reversal of the Dismissal Order

The Third Circuit upon a "thorough review" of the record reversed the District Court's dismissal order on February 23, 1976. Among other things:

(1) The Circuit Court concluded that there was "insufficient evidence" to support a finding by the District Court that M-GB's failure to file supplemental answers to the "damage" interrogatories by June 14th was "flagrant bad faith, willful and intentional" (App. A, p. 16a) within the standard enunciated by this Court in *Societe Internationale* v. *Rogers, supra.* The Circuit Court specifically noted Mr. Wagman's explanation to the District Court during oral argument on June 26th as to the inadvertent "targeting" of the wrong date for supplementing these answers and the fact that M-GB had, on the first business day following the discovery of the mistake sought an extension of time from defendants' counsel (App. A, p. 16a);

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[17] The Court's virtual line-by-line adaptation of defendants' version of the facts contained in their memorandum in support of their motion to dismiss is shown by comparing App. E, pp. 25a-30a, 31a-36a, 38a of the opinion with R. 2736-39, 2739-41, 2743 of the memorandum. Here we would note that in *Industrial Building Materials, Inc.* v. *Inter Chemical Corp.*, 437 F.2d 1336, 1339-40 (9th Cir. 1970) the Ninth Circuit Court of Appeals sharply criticized similar reliance on an advocate's view of disputed facts suggesting that it was incompatible with the duties of an impartial judge. There, as in the present case, the adopted findings were interlaced with an inordinate amount of "invective, scorn and unnecessary criticism."

(2) The Circuit Court also found that there was nothing disclosed in the Court's opinion to indicate that it had considered an alternative sanction before imposing the stringent sanction of dismissal holding that it was "incumbent on the court in exercising its reasoned discretion to review the possible use of an alternative sanction" (App. A, p. 11a);

(3) The Circuit Court also took cognizance of several important "mitigating" factors which the District Court failed to consider such as the "onerous burden" placed upon M-GB's counsel as a result of the decision enforcing Mr. Kohn's attorney's lien—a decision which "left [M-GB] with almost no discovery materials . . . [in] a complex antitrust case scheduled for trial in five weeks" (App. A, p. 14a). It stressed that even with this handicap, M-GB's new counsel had nonetheless "exercised an enormous effort after they took control of the case in attempting to complete the discovery matters within a brief period" and that they had "worked frantically to complete discovery within the deadlines set by the court" (App. A, pp. 16a, 14a).

(4) The Circuit Court also observed that it was error for the District Court to hold that M-GB was in "default" for "seventeen months" in answering the interrogatories where for eight months prior to February 20, 1974, the parties and the Court had permitted negotiations directed to so-called "inadequate" interrogatory answers and other discovery matters to languish unresolved and where M-GB had been represented by different counsel which had since become its adversary (App. A, pp. 12a-13a).[18]

[18] In this respect, it should be noted that the statement defendants attribute to M-GB's prior counsel Mr. Kohn at page 7 of their petition as to the inadequacy of the answers he filed on behalf of Metropolitan on May 25, 1973 was made in the course of the adversarial proceeding between Mr. Kohn and M-GB dur[illegible]g

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On March 1, 1976, the Third Circuit denied defendants' application for a rehearing of the decision in banc (App. C, p. 19a).

Discussion of the Reasons Why the Writ Should Be Denied

Petitioners in separately numbered paragraphs at pages 16-23 of the petition advance five reasons for granting the writ of certiorari. These are discussed in the same order as presented in the petition.

1. Initially, petitioners urge that the Third Circuit misapplied the applicable standard set forth in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) by holding that noncompliance with a discovery order must be "willful, conscious and intentional" in order to support the drastic sanction of dismissal. They contend upon the basis of *dicta* in *Link* v. *Wabash R.R.*, 370 U.S. 626, 636 (1962) that dismissal is also proper where noncompliance is "a product of neglect". On this basis, they urge certiorari to avoid the "demise of the dismissal sanction as an indispensable component of the carefully constructed discovery rules" (Petition, pp. 16-18).

It is submitted that the Circuit Court correctly interpreted and applied the standard of *Societe*. The Circuit Court was cognizant of, and in fact, thoroughly discussed

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oral argument of the attorney's lien motion (R. 2738, 1731-34). Significantly, this unsworn statement had never been included in the written summaries of all contact between Mr. Kohn's office and M-GB prepared at the Court's request (R. 1525, 1530). Moreover, on May 31st, 1973, six days after filing the answers, Mr. Kohn forwarded copies to Metropolitan's then general counsel, the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison, making no reference to the inadequacy of the answers. Neither did he request additional answers (R. 1759). At the same time, Mr. Kohn advised the Court that his office "answered in good faith everything they asked us to answer . . ." (R. 1104).

the due process considerations underlying *Societe* and the prior opinions of this Court in *Hovey* v. *Elliot*, 167 U.S. 409 (1897) and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909) (See App. A, pp. 11a-12a). In its opinion, the Circuit Court carefully detailed the unique facts of this case which distinguish it from prior Third Circuit decisions affirming Rule 37 dismissals in which "willful, conscious and intentional conduct" was clear and apparent. See e.g. *DiGregorio* v. *First Rediscount Corp.*, 506 F.2d 781 (3rd Cir. 1974) where the plaintiff deliberately spurned the opportunity given her by the Court to remove her attorney as an alternative to dismissal;[19] *Mangano* v. *Amercan Radiator and Standard Sanitary Corp.*, 438 F.2d 1187 (3rd Cir. 1971) (*per curiam*) where plaintiffs after prior default in answering interrogatories had consented to a conditional dismissal order and four months subsequent to the extended deadline had failed to cure their default or to offer any reason for their non-compliance; and *Hastings* v. *Maritime Overseas Corp.*, 411 F.2d 1201 (3rd Cir. 1969) where plaintiff failed to appear for court ordered depositions and offered no excuse for failure to answer interrogatories.

As these decisions demonstrate, the dismissal sanction as an "indispensable component of the carefully constructed discovery rules" has continued to survive since *Societe*. Petitioners' suggestion that the Third Circuit's decision is an aberration which somehow may "spell the demise of the dismissal sanction" is utterly unfounded.

Significantly, petitioners have made no contention, much less a demonstration, that the Third Circuit's interpretation of *Societe* is in conflict with the decisions of the other circuit courts of appeals. In fact, the Third Circuit's requirement of "willful, conscious and intentional" conduct, as

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[19] Significantly, Circuit Judge Rosenn, who wrote the majority decision affirming dismissal in *DiGregorio* voted for reversal in this case.

opposed to "neglect", in order to support a Rule 37 dismissal is in complete accord with decisions of the other Circuit courts. See e.g. *Flaks* v. *Koegel*, 504 F.2d 702, 707-710, (2nd Cir. 1974); *Dunbar* v. *United States*, 502 F.2d 506 (5th Cir. 1974); *Vac-Air, Inc.* v. *John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir., 1973); *Kakuwa* v. *Sanchez*, 498 F.2d 1223 (9th Cir. 1974); and *Robison* v. *Trans America Insurance Co.*, 368 F.2d 37 (10th Cir. 1966).

2. Petitioners next contend that the Court exceeded its authorized scope of review by making critical "appellate findings" that (a) M-GB's counsel Mr. Wagman, had not seen the interrogatories when he made his commitment to answer them by March 11, 1974, and (b) that the failure to file supplemental answers by June 14th, was the result of "clerical error". They urge that it is "highly appropriate" for this Court to "review the question whether the courts of appeals have any power at all to make findings of their own in their review of district court actions under Rule 37" (Petition, p. 18).

There were of course, no such "appellate findings" upon which the decision turned. Rather the Third Circuit in compliance with its obligation to thoroughly search the entire record (*cf. Diapulse Corp. of America* v. *Curtis Publishing Co.*, 374 F.2d 442 (2nd Cir. 1967)) concluded that there was "insufficient evidence" to support the District Court's finding that the failure to file supplemental answers to the 56 "damage" interrogatories by June 14, 1974 was "in flagrant bad faith, willfull or intentional" (App. A, p. 16a). In reaching this conclusion, the Court took note of the substantial evidence in the record that the failure to file the supplemental answers was inadvertent and resulted from the failure to properly target the correct date, including Mr. Wagman's own statement to the District Court during oral argument of

the motion to dismiss on June 26th (App. A, p. 16a).[20] The Court clearly made no "appellate finding" that the failure to file the interrogatories was the result of "clerical error" nor was it required to in order to reverse the judgment below.

The alleged "appellate finding" that M-GB's counsel had not seen the interrogatories was merely a statement in the opinion questioning the "judgment" of M-GB's counsel in committing himself to answer the interrogatories by March 11 "especially when he had not seen them" (App. A, pp. 14a-15a). This latter phrase was a reference to a previous sentence in the Court's opinion where it stated:

> "At the time of this commitment, M-GB *asserts* that its counsel had not seen a 114-page set of interrogatories with multiple subparts aggregating 1,150 questions and did not realize the inherent difficulty in supplying the answers" (App. A, p. 7a) [emphasis supplied].

This statement in context can hardly be said to constitute an "appellate finding" that M-GB's counsel had never seen the interrogatories. Moreover, the statement suggests that the Court questioned Counsel's judgment in making the commitment to answer interrogatories of this scope and nature whether or not he had previously seen them.

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[20] There was additional evidence in the record of the inadvertent nature of the failure to file answers which was not before the District Court at the time of its July 3, 1974 opinion and which was supplied in support of the July 15, 1974 motion for reargument. This included Mr. Wagman's Affidavit (R. 2886-3072) and the pretrial schedules prepared by Golenbock and Barell's managing clerk from which the June 14th date had been omitted (R. 3008, 3009). This new evidence removed any doubt as to the reasons for the failure to file the supplemental answers and the District Court should thereupon have vacated the dismissal. See *Gill* v. *Stolow*, 240 F.2d 669, 671-2 (2nd Cir. 1957).

The Third Circuit's conclusion that the District Court had "abused its discretion" in dismissing the complaint with prejudice was made upon a "thorough review" of the record in which all of the relevant factors were carefully weighed. We submit that such a scope of review was in all respects proper and that the decision below should not be disturbed on this ground. See *Diapulse Corp. of America* v. *Curtis Publishing Co., supra* (2nd Cir. 1967); *Gill* v. *Stolow, supra* (2nd Cir. 1957); *Fox* v. *Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975). Compare, *In re Josephson*, 218 F.2d, 174, 182 (1st Cir. 1954).

3. As a third reason for granting the writ, petitioners urge that it is "indispensable, that the district court take into consideration the antecedent procedural history of the case" and they suggest that the opinion below must be read as precluding consideration of antecedent procedural history by the District Courts in determining the application of sanctions. They contend that this Court should review the judgment of the Court below in light of the purposes of the 1970 amendments to Rule 37 which they argue were to "encourage more frequent imposition of sanctions" (Petition, pp. 19-20).

To begin with, the opinion below simply cannot be read in the manner petitioners suggest. To the contrary, the Third Circuit carefully considered the antecedent procedural history in reaching its determination that the "sanction of dismissal was improper under the circumstances of this case" (App. A, p. 17a). In thoroughly reviewing the procedural history of more than seventeen months, it determined that there were important "mitigating" circumstances and "extenuating factors" precluding the imposition of the drastic sanction of dismissal including (a) the fact that for eight months prior to February 20, 1974, the parties and the Court had permitted negotiations directed to so-called "inadequate" interrogatory answers and other discovery matters to languish

unresolved; (b) the fact that during the period prior to February 20, 1974, M-GB was represented by different counsel who had since become their adversary; (c) the "onerous burden" placed upon M-GB's new counsel of litigating this complex anti-trust case with almost no discovery materials; and (d) the fact that M-GB's new counsel had "exercised an enormous effort after they took control of the case" and had "worked frantically to complete discovery within the deadlines set by the Court" (App. A, p. 16a, 14a).

Clearly, there is no need to review the judgment below in order to "encourage more frequent imposition of sanctions" as suggested by petitioners. The Third Circuit never meant to suggest that the imposition of sanctions under Rule 37 was inappropriate here—only that the imposition of the most drastic sanction, dismissal with prejudice was improper. Indeed, the lower Court's failure to consider a lesser alternative sanction was one of the primary reasons that led the Third Circuit to reverse the District Court (App. A, p. 11a).

4. The fourth reason proffered by petitioners for granting the writ is that the Circuit Court erred when it sought to carefully distinguish between the conduct of M-GB and their present counsel in the period subsequent to February 20, 1974 on the one hand and the conduct of the litigation under Mr. Kohn prior to that time. They urge this Court to grant review so as to make clear that there should be no distinction made between the conduct of lawyer and client in determining whether to apply Rule 37 sanctions. Here, they point to language in *Link* v. *Wabash R.R.*, 370 U.S. at 633-34 which they suggest forecloses any such distinction in considering Rule 41 (b) dismissals. They argue that this "principle" should be extended to Rule 37 (Petition, pp. 20-22).

We suggest that this case with its unique facts is hardly one which lends itself to the fashioning of broad principles governing distinctions between conduct of lawyers and clients under Rule 37. Indeed, and as recognized by the Circuit Court, M-GB's prior counsel had become their adversary by the time of the settlement in February 1974 and moreover, had refused to make his files available to M-GB and their new counsel. Under these circumstances, the Third Circuit recognized that it would have been most inequitable to charge M-GB and their new counsel with any "delays and deficiencies" on Mr. Kohn's part (App. A, p. 14a), especially where the denial of files had deprived M-GB and their new counsel of access to materials necessary to respond to the NHL's contentions that there had been "defaults" by Mr. Kohn in the period prior to February 20th.[21]

In any event, we do not agree with petitioners' contention that *Link* "settled" any "principle" that Courts should not distinguish between the conduct of lawyer and client in determining whether to dismiss for want of prosecution under Rule 41 (b). In *Link*, the action had been pending for more than six years and the dismissal was premised on far more than counsel's dereliction in not attending a pre-trial conference. Indeed, Justice Harlan writing for the Court noted that it could reasonably be inferred from the drawn-out history of the litigation that "petitioner had been deliberately proceeding in 'dilatory fashion' ", 370 U.S. at 633.

Link has never been read by the Circuit Court as precluding them from distinguishing between the conduct of attorney and client in determining the propriety of a Rule

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[21] In this respect, those papers that were filed with the Court make clear that Mr. Kohn had at the relevant times prior to February 1974 disputed the NHL's contention that any "defaults" had occurred (See e.g. R. 806, 1172-82).

37 dismissal. In fact, the distinction has on many occasions been emphasized. See e.g. *DiGregorio* v. *First Rediscount Corp., supra; Fischer* v. *Buchl,* 45 F. 2d 950 (Third Cir. 1971); *Edsall* v. *Penn Central Transportation Co.,* 479 F.2d 33 (6th Cir. 1973), *cert. den.* 414 U.S. 1040 (1973); *Flaks* v. *Koegel, supra.* We submit that the courts must be left free to continue to consider this vital distinction, especially in view of the wide range of options confronting the District Judge under Rule 37.

5. Finally, petitioners urge that certiorari should be granted on the ground that the Third Circuit has "dictated to trial judges that their discretion to impose the sanction of dismissal is so narrowly circumscribed as to be virtually non-existent" and that this will "undermine the power of trial judges to control the discovery process and will encourage abuses of that process by litigants" (Petition, pp. 22-23). We do not agree.

Clearly, the District Court's range of discretion under Rule 37 to impose the drastic sanction of dismissal has always been considered to be narrow and subject to close examination on review. See *Fox* v. *Studebaker-Worthington Inc.,* 516 F.2d at 993. Within that narrow range—one which is circumscribed by due process considerations discussed in *Societe*—the Courts may still impose dismissal for conduct short of that in which a litigant would "verbalize his defiance of the court" (Compare Petition, p. 20). In fact, the Third Circuit has approved the imposition of a dismissal sanction for such conduct in the past[22] and there is no reason to believe that it will not do so in the future.

Petitioners' contention that the Third Circuit's decision will "undermine the power of trial judges to control the discovery process [or] . . . encourage abuses of that proc-

[22] See *Mangano* v. *American Radiator and Standard Sanitary Corp., supra;* and *Hastings* v. *Maritime Overseas Corp., supra.*

ess by litigants" is equally misplaced. The Second Circuit in reversing the District Court's dismissal in *Gill* v. *Stolow, supra,* addressed this issue squarely and said:

> "The proper disciplining of a party under circumstances of default is one of those necessary, but troublesome, questions which usually must be left to the control of the trial judge in the course of his administration of his court. Reluctant as we are to interfere, we feel that this is an occasion where, viewed with the hindsight afforded us by a study of the entire record, the penalty assessed is too drastic and the case must be returned to accord defendants a trial of the seriously contested issues of fact involved. In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default" 240 F.2d at p. 670.

The Third Circuit's application of this reasoning to the facts of the instant case is eminently correct and its decision to reverse, obviously made after carefully weighing the effects if any, upon the power of trial judges to control the discovery process, should be allowed to stand. In its supervisory capacity over the District Courts in its circuit, the Third Circuit rather than self-interested litigants such as petitioners, is in the best position to make this important policy judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be in all respects denied.

Dated: New York, New York
May 26, 1976

Respectfully submitted,

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